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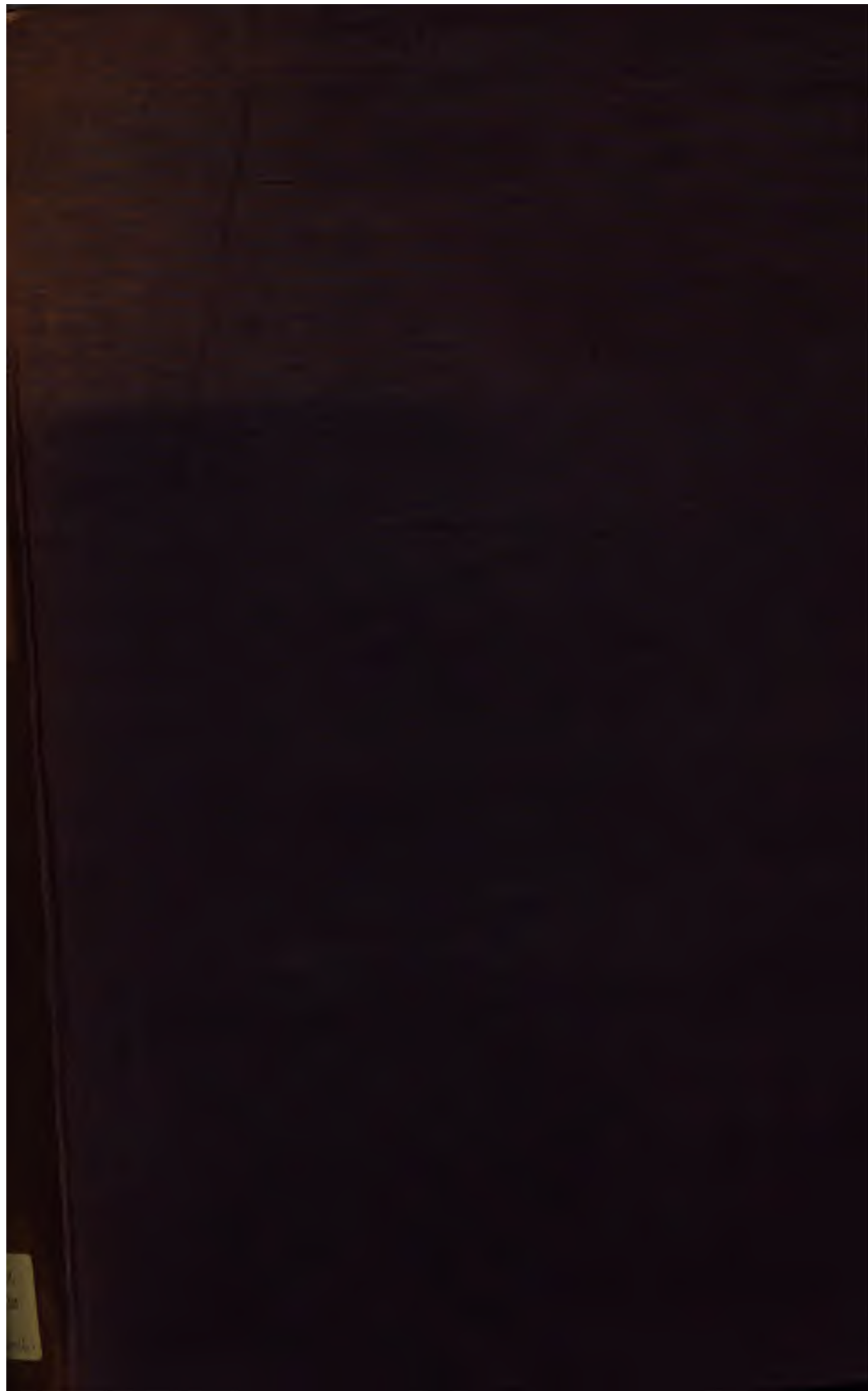
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THE
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IN
SCOTLAND.

BY JOHN HILL BURTON, ESQ.
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EDINBURGH:
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TO
THE HONOURABLE
LORD MURRAY,
TO WHOSE PARLIAMENTARY EXERTIONS
AS LORD ADVOCATE,
THE COUNTRY
IS INDEBTED FOR EXTENSIVE AMENDMENTS
OF
THE LAW OF DEBTOR AND CREDITOR,
THIS WORK IS DEDICATED.

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INTRODUCTORY NOTICE.

IN a chronological notice of the progress of the bankruptcy law of Scotland, the full and satisfactory investigations of Professor Bell render unnecessary any thing beyond a very brief outline of the early history of the system. By an old principle of our law, which has descended to us from the civilians, any alienation of a man's property, made with an intention of defrauding his onerous creditors, is an illegal act. In the year 1621, an act of sederunt, which the Court of Session had passed as a rule for its decisions in conformity with this principle, was confirmed by Parliament; and alienations made by an insolvent person to his near relations, or to persons connected with him in business or otherwise, who might aid him in cheating his creditors, as well as alienations of property, against which lawful creditors had begun to sue out diligence or execution, were declared to be illegal.* In 1661, statutory regulations were passed for preserving the heritable estate of deceased persons from being carried off by those creditors who, by fortunate activity or collusion, might be first in the race of diligence;† and in 1662, the same end was accomplished in relation to the moveable estate by an act of sederunt, prohibiting, during a certain period, the execution of the usual formalities, through which the ordinary creditors of the deceased might recover payment.‡ In 1681 and

* 1621, c. 18.

† 1661, c. 24.

‡ A. S. 28th Feb. 1662.

1690, provisions were made for conducting the sale of landed property burdened by debts, for the mutual and equal benefit of those entitled to partake of the produce.* In 1696, certain rules were constructed for testing the status of bankruptcy, with the view especially of giving the honest creditor redress against the bankrupt's collusive transactions with favoured claimants.† The imperfect operations sanctioned by this act, as afterwards aided by the arrangements for equalizing diligence, are still in many cases the only means by which the estate of a debtor, who does not come within the sequestration act, can be kept from falling to the lot of those creditors who are first in a contest for priority.

It was not until the year 1772,‡ that a law was passed for collecting and distributing the property of a bankrupt trader in Scotland after the plan which had subsisted since the year 1570 in England, and the first sequestration act was limited to the moveable estate. It contained clauses for equalizing the rights of persons who, within a certain limited period, might follow out the steps of diligence, calculated for attaching moveables; and with the subsequent addition of a like clause regarding heritable property, and the enlargement of the period, this provision became a feature of the later sequestration statutes, which is still preserved as it stands in the act of 1814. In 1783,§ the process of sequestration was extended to the landed estate of a trading debtor. The act of that year was superseded by the act of 1793; and the system was remodelled in 1814,|| by a temporary act, from time to time renewed, until the act of 1839.

The leading defects, which some years of practice developed in the act of 1814, were,—that the interest in the debtor's estate, which gave creditors the privilege of demanding the application of the act, was fixed at too high a sum, and the system consequently did not descend to

* 1681, c. 17; 1690, c. 20.

§ 23 G. III. c. 18.

† 1696, c. 5.

|| 54 G. III. c. 137.

‡ 12 G. III. c. 72.

classes of traders who might appropriately come under its operation; that the incidental procedure was costly and cumbrous, from there being no machinery for enforcing it subsidiary to that of the supreme civil tribunal; that, especially, questions as to the qualifications of creditors to act in the sequestration, being remitted from the supreme court to special commissioners, and brought back again, frequently made inquiries into the foundation and character of the debts of individual creditors as tedious and as expensive as separate litigations; that the prospect of getting their expenses paid by litigious creditors was a temptation to unprincipled law agents to institute expensive proceedings in regard to matters of trifling importance, and to conduct their operations with more regard to their own interest than to the benefit of the creditors; that the proceedings were capable of being protracted beyond the time necessary for the satisfactory realization and distribution of the estate; and, that there were not effectual provisions for protecting the residue of the estate from being misappropriated, in instances where the tediousness of the proceedings had exhausted the vigilance of those creditors properly entitled to share in it. These prominent defects, and many others of a less important character, were remedied by the act of 1839,* to which so large a proportion of the following pages is devoted. The pecuniary qualifications of the petitioning creditors were reduced. For the purpose of uniting the sanction and control of the supreme court with the economy, despatch, and general convenience of a local management, the process was made to issue from the Court of Session, and to be remitted, for the conducting of the incidental business, to the sheriff of the county; the Court of Session interposing its sanction to the discharge of the debtor, and of the trustee. The method of inquiry into the qualifications of creditors was simplified. The claims of agents were restricted to the estate realized. The in-

* 2 & 3 Vict. c. 41.

tervals between the several operations were shortened ; and a provision was made for the preservation of unclaimed dividends, by which they remain accessible to the creditors entitled to them in the first place, and subsequently, on their not being claimed, revert to the public. In the arrangement of the jurisdiction, advantage was taken of the valuable system of local judicatories in Scotland, to establish, without the construction of any new machinery, a parallel to the new judicial arrangements as to bankruptcy in England, where a fiat, after having been issued from the Court of Chancery, goes to a Court of Bankruptcy, in which the incidental procedure is conducted before an individual commissioner. The parallel has been preserved in the continuance of the jurisdiction of the Court of Session, during the subsistence of the process, as a court of review. In the Scottish measure, as it was originally laid before parliament, there were two features which, probably, the extent and efficacy of the insolvency system in that part of the country would render inexpedient in the bankruptcy law of England. By the one, it was proposed, that insolvents, though not connected with trade, might, on their own application, be subjected to the operation of the act ; by the other, sequestration was extended to the estates of deceased debtors, whether they were traders or not. The former of these clauses was lost in the discussion of the measure ; but the latter was preserved, and constitutes a material feature of the act. During the dependence of this measure for several years in parliament, various reforms were accomplished in collateral branches of the law of debtor and creditor. In 1835,* imprisonment for small debts was abolished. In the following year, the law of cessio was regulated by statute;† and in 1838, the method of conducting diligence or execution against person and property for debt were simplified, and more intimately connected with the executive jurisdiction of the sheriffs.‡

* 5 & 6 W. IV. c. 70. † 6 & 7 W. IV. c. 56. ‡ 1 & 2 Vict. c. 114.

The English bankruptcy law traces its statutory descent so far back as the year 1542,* and so early as the year 1570,† we find it resolving itself into its characteristic shape as a system peculiar to the mercantile class. Until a comparatively late period, the system was distributed through a host of statutes, of which one so old as the year 1603,‡ contained many of those essential definitions of an act of bankruptcy, which, though they are but very brief expressions, having been interpreted and adapted to practical use by a long train of decisions, are preserved as important features of the existing system. In 1825, the varied mass of bankrupt law was, along with some improvements suggested on the occasion, consolidated into one statute.§ Among the later amendments which that statute re-enacted was the provision of Sir Samuel Romilly's act for ranking annuity creditors.|| In Scotland, the example of such rankings, as well as the admission of claims on contingent debts, had been set by the equitable interposition of the court; but a statutory provision on the subject, modelled on that of the English act of 1825, was embodied in the sequestration act of 1839: and, as a suitable illustration of the subject, the author has endeavoured to adduce the most important of the decisions which have taken place on this clause in the English courts. A clause for the ranking of contingent creditors, first made law in England by the act of 1825, has also been incorporated in the Scottish act, and has suggested the utility of an inquiry into the decisions on the clause while it was peculiar to the English system. It is believed that if the analogy of the English decisions were to hold in Scotland, these clauses may be found to have important effects on the rights of persons who are creditors under family settlements. By another new and important provision, the act

* 34 & 35 Henry VIII. c. 4. † 13 Eliz. c. 7. ‡ 1 Jac. I. c. 16.
§ 6 G. IV. c. 16. || 49 G. III. c. 121. § 17.

of 1826 made arrangements for a creditor who feels himself insolvent, rendering his estate liable to the bankruptcy system, by filing a declaration of insolvency. But not the least remarkable of the new features of the act of 1826, was probably the adoption from our own sequestration law of the system of composition contracts adjusted under the rules of the act, and with judicial sanction; and this system is now an important element of the bankrupt law of England.

A material alteration was made on the bankruptcy system by Lord Brougham's act in 1831.* It did not alter the circumstances which created the state of bankruptcy, the extent of property involved in it, the nature of the distribution, or the claims of creditors; but it materially changed the judicial procedure, and created a new class of superintendants and managers. Under the previous system, the process commenced by the issuing of a commission by the Lord Chancellor to certain individual commissioners, before whom the bankruptcy proceeded. These commissioners were vested with certain judicial and executorial powers for recovering the estate, conducting compulsory investigations, conveying to purchasers, &c.; and possessed a certain control over the assignees chosen by the creditors. The system was connected with the jurisdiction of the Court of Chancery, the proceedings before which appear to have been accompanied with inconveniences in some respects of the same description as those which characterized the Scottish sequestration system. By the act above referred to, a new tribunal was created to adjudicate in matters of bankruptcy. The authority to conduct the proceedings was made, like the awarding of sequestration by the Court of Session, to issue from the Court of Chancery; which continues to have a restricted appellate jurisdiction in cases of bankruptcy. But between the actual managers of the estate and this supreme court

* 1 & 2 W. IV. c. 56.

a distinct tribunal was established in what were denominated town bankruptcies, or those proceeding within a certain circuit round London. The Bankruptcy Court consists of judges and commissioners. By Lord Brougham's act, provision was made for a certain number of persons being appointed commissioners on the various circuits; and, when a fiat issued from the Court of Chancery, it was to authorize the petitioning creditor to prosecute his claim in the Court of Bankruptcy in the case of a town bankruptcy, or before one or more commissioners if it were a country bankruptcy. A new class of officers was created by this act, whose duties were limited to town bankruptcies, called official assignees. They are men of mercantile experience, who hold a fixed official position in the Bankruptcy Court. They are constituted for the purpose of not only co-operating with the assignee chosen by the creditors, who holds a like position in England to that of the trustee in Scotland, but of attending to the interim management until the chosen assignee is elected. The bankrupt's personal property, and the proceeds of his real property, are received by the official assignee. The employment of the solicitor, and the direction of the sale of the bankrupt estate, are duties peculiar to the chosen assignee, with which the official assignee is not to interfere. It has been supposed, that in this arrangement there are permanent precautions against dishonest mismanagement on the part of the assignee, while the chances in favour of such zeal and activity in the realization of the estate, as can only be expected of an officer specially chosen and relied on by the creditors themselves, are not diminished.

The Bankruptcy Court act was followed by some secondary amendments of the law, the main object of which was to carry out the principle of excepting *boná fide* transactions occurring between the act of bankruptcy and the fiat, from the nullifying operation of the old law.* Com-

* See these noticed in the following work, p. 230.

missioners were, in the meantime, appointed to inquire into the state of the law, both of bankruptcy and insolvency; and their report was presented to Parliament in 1840. Partly founded on the recommendations of the commission, an act was passed in 1842, materially altering both the judicial and executive arrangements for the administration of the law of bankruptcy, and the substance of the law itself.* The main feature of the former department of this act is, the extension of the system of the Court of Bankruptcy to country bankruptcies. Twelve district commissioners are appointed, who must be serjeants or barristers of seven years' standing, and who are to be the judges of district courts of bankruptcy, before which flats are to be prosecuted. A corresponding provision is made for the appointment of official assignees, whose duties correspond with those of the assignees attached to the Court of Bankruptcy. The debts necessary to qualify petitioning creditors are, by this act, reduced to the same amount at which they are fixed by the last sequestration act in Scotland.† Facilities are given for bringing debtors under the operation of the act. At first sight, the means by which an act of bankruptcy is accomplished, convey to a Scottish lawyer the idea that an insolvent trader cannot easily escape from them, if it is the wish of his creditors to bring him within the law; and that, at all events, he may easily allow himself to be brought under its operation. But there appear to have been difficulties in the way, which, to those who are familiar with our own rapid and efficient means of subjecting the persons and property of debtors to execution, at the instance of their creditors, cannot be easily estimated; and in the report of the commission above referred to, it is observed that the beneficial act for abolishing arrest in mesne process, had here produced an incidental defect. The commissioners say,

* 5 & 6 Vict. c. 122.

† See below, p. 279.

"The power of arrest in mesne process, caused not merely the act of bankruptcy, by lying in prison for twenty-one days, but induced traders who were unable to meet their engagements to commit other acts of bankruptcy, by departing from their dwelling-house, or otherwise absenting themselves, or beginning to keep house. A trader, not being in fear of personal arrest till after judgment, has now no motive for committing any of the acts of bankruptcy until a judgment be obtained against him, when they are of comparatively little avail to creditors." With the view of remedying this defect, provision was made in the new act for bringing the debtor into the Court of Bankruptcy, and there, on his neither paying the debt, nor showing that he was prepared to dispute its legality, placing him in the position of having committed an act of bankruptcy. It was a new feature of the act of 1825, that the creditor might render himself liable to the operation of bankruptcy by filing a declaration of insolvency; and it was proposed by the commissioners, that analogy should be taken from the sequestration system in Scotland, and that not only should the insolvent be able to render himself liable to the process, but be authorized to seek its enforcement, as an expedient method of dividing his estate among his creditors.

This deficiency was supplied in 1844 by an act which will be more particularly noticed below; and the Lord Chancellor is authorized, where a trader has filed a declaration of insolvency, to issue a fiat against him on his own petition.*

The law for the release of insolvent debtors, in England, is intimately connected with that of bankruptcy. The progress of legislation, on this subject, in all parts of the empire, has been towards the removal of the arbitrary operation of imprisonment, as a method of coercion and intimidation, and to the adoption of mea-

* 7 & 8 Vict. c. 96, § 41.

asures for giving the creditors ready and effectual access to the debtor's property. The methods by which the instrument of individual coercion, characteristic of a barbarous age and of unscientific legislation, has been gradually superseded by less coercive but more effectual means of obtaining payment from reluctant debtors, as they have proceeded in the two ends of the island, have been relatively characteristic of the distinct nature of the first principles of the law of debtor and creditor in the two countries. In Scotland, where it never was the principle, that a man's "house is his castle,"—where we have long possessed the valuable process of arrestment, and where heritable property is attached by a simple process,—the tendency of imprisonment has been to facilitate and shorten the ordinary forms of execution for the recovery of debt. In England, where, until there was a late partial amendment of the old law, real property was not liable to be attached for simple contract debts,* and where a system parallel to that of arrestment is unknown excepting within the city of London and some other places where the writ of foreign attachment may be sued out, the tendency has been, without any zealous attempt to improve the facilities for individual creditors obtaining payment, to have recourse to the sweeping process of a general bankruptcy. Formerly, temporary acts were passed for the relief of insolvent debtors, on occasions when the jails were over crowded. The law on the subject was consolidated and resolved into a general system in 1826.† It was remodelled in 1838, by Lord Campbell's act,‡ commonly called the act for abolishing arrest in mesne process. The most succinct description which can be given of that measure is, that it is a complete code of bankruptcy, adapted to the realiza-

* 3 & 4 W. IV. c. 104, called "An act to render freehold and copyhold estates assets for the payment of simple contract debts," viz. on the holder's decease.

† 7 G. IV. c. 57.

‡ 1 & 2 Vict. c. 110.

tion and distribution of the estates of bankrupts who are not merchants. Framed, undoubtedly, on the principle of the *cessio* system in Scotland, it contains new and totally distinct elements of utility, in the precision and comprehensiveness of its arrangements. With us the process of *cessio* has always been looked upon merely as a means of protection, to a ruined bankrupt, from the persecutions of creditors, as to whose operations the utter hopelessness of their realizing any thing, indicates that they are not dictated by the view of getting access to the debtor's property. For the attachment of the debtor's estate, and its careful and just distribution among creditors, we have thus hardly any provision. In England, passing through the insolvent debtors' court is not, necessarily, the mere last refuge of the hopeless insolvent. It is an ordeal to which the creditors, who suspect that their debtor is protracting the fulfilment of his obligations, or concealing his funds, may compel him to have recourse. It differs from mercantile bankruptcy in one main feature. The insolvent, when he has made a fair surrender, and otherwise complied with the requisites of the act, is released from the immediate operations of his creditors, but he is not discharged from his debts; and, if he subsequently succeed to any property, it becomes liable to meet them. The absolute discharge peculiar to the other description of bankruptcy has been considered properly applicable only to those classes of men whose insolvency is likely to be caused by unfortunate commercial speculations or convulsions in trade, and the complete exemption from all liabilities of a person whose difficulties may fairly be attributed to extravagance, and who may seek the benefit of a discharge, only that he may look forward to the enjoyment of some succession undiminished, has been considered a dangerous proposal. In the report of the commission above cited, the distinction between the bankruptcy and insolvency system is comprehensively stated in these words:—

“The law relating to bankrupts is confined to traders under certain conditions.

“The law relating to insolvent debtors is applicable only to debtors, (whether traders or non-traders,) who have undergone a certain imprisonment.

“The immediate object of the bankrupt law is the equal distribution of the effects of traders, who cannot meet their engagements; its ordinary consequence is, the release of such traders from all future liability of their persons, and after acquired property.

“The object of the law for the relief of insolvent debtors is the personal discharge of honest debtors; prolonged imprisonment by way of punishment for the dishonest and fraudulent, and a fair distribution of their present effects and future acquired property among their creditors.”

Two acts have lately been passed,* introducing a system applicable both to traders and to ordinary insolvents, intended to apply to minor cases, and to act as measures of relief, in some respects after the manner of our *cessio*. The system may be taken advantage of by insolvent debtors who are not traders, or by traders whose debts do not exceed £300. The execution of these acts is committed to the district bankruptcy courts, created by the bankruptcy act of 1842; and the general operation of the system has the effect of discharging the applicant from personal execution, if he make a fair surrender of all his means for distribution among his creditors under the terms of the act, and of protracting his imprisonment, and otherwise subjecting him to punishment, if his conduct be fraudulent or obdurate. It is in the latter of these acts,—that of 1844, that the well known measure for abolishing imprisonment, even in final process, where the debt does not exceed £20, is embodied.†

A work on the law of bankruptcy must necessarily

* 5 & 6 Vict. c. 116, 12th Aug. 1842; 7 & 8 Vict. c. 96, 9th Aug. 1844.

† 7 & 8 Vict. c. 96, § 57.

embrace much law which is applicable to other circumstances than the distribution of the estates of insolvent persons. As the various contracts which the bankrupt has made, and the obligations to which he has been voluntarily, or by the tacit operation of law, subjected in his solvent state, affect the division of his estate when he becomes insolvent; the commentator would only partially perform his task if he did not discuss those circumstances, whether arising in the interpretation of special contracts, or in the operations of any general law, which create a correspondent variety in the characters of the claims to which the estate, when solvent, is liable. The bankruptcy lawyer is thus compelled to make an inroad on those branches of the science which deal with the nature of pecuniary claims, whether arising from contract or from the other legal sources of rights and obligations. The range of subjects embraced is thus apt insensibly to expand; and it happened fortunately for the elucidation of the law of Scotland that the work of the late Professor Bell, commencing with bankruptcy as a centre, enlarged its compass till it comprehended the whole of the law which either deals with pecuniary claims in themselves, or discusses the rights and obligations out of which they may arise; and thus became a comprehensive institute of the law of Scotland, which omits only those portions which treat of crimes, and the public law connected with the municipal, ecclesiastical, or judicial institutions of the country.

An effort has been made on the present occasion, in dealing with that part of the work which may be equally applicable where there is, and where there is not insolvency, to limit the inquiry to such matters only as may come under discussion in direct relation to the division of estates insufficient to meet in full all the demands that may be made against them. Thus, where the ranking of securities of different kinds on the heritable estate is

considered, the methods by which heritable rights are constituted—the form of bond and disposition in security—the method of taking infestment, &c. are not discussed, because the question whether such a right has been properly constituted is one that in itself is quite distinct from any question as to the effect of the bankruptcy. But the circumstances which affect such rights in competition with each other, are treated of; because, although they may come into operation when the estate is solvent, they materially affect the distribution when it is bankrupt, and are a subject of inquiry essentially connected with the process of converting it into money, and partitioning the proceeds among the creditors.

In the arrangement of the work, the subjects, which are thus common to bankruptcy with other branches of the law, are separated from those which bear solely on cases of bankruptcy. The former class is discussed first in order, under the general head of Ranking. It might seem, at first sight, that the method of having the estate judicially attached for the benefit of creditors should, in a logical arrangement, precede that of distribution. But when it is remembered that the rules of distribution, considered under the head of ranking, are not peculiar to any one of the several processes by which insolvent estates are divided among the creditors, but are the elements with which they have all to deal, it seemed an expedient arrangement to confine these principles of ranking to a distinct book, and place it at the commencement of the work. The incidents that affect the claims of creditors in whatever distributing process they may be adduced, being examined, the next subject that presented itself was, the consideration of those circumstances which, as indicating the bankrupt's inability to meet his debts, bring his estate within the operation of the laws for protecting the creditors at large from the proceedings of individuals; and thus Insolvency

and Notour bankruptcy, with their respective effects on the debtor's property and engagements, are considered in the second and third books. The way is thus opened for the consideration of the various processes by which the estate may be realized and divided among the claimants. The first and most important of these is Mercantile sequestration; and this is followed by the subsidiary methods of Composition contract, Judicial sale, and Cessio bonorum. The author might have been tempted to add a treatise on the subject of voluntary trusts for behoof of creditors, had he not already found that important subject in the abler hands of his friend Mr Forsyth.

Some explanation may be expected of the reason for adopting a method of subdividing the matter of this work, different from that which is usually followed in legal treatises, whether of the character of digests or of commentaries. The author found that his materials arranged themselves in the double form of digest and commentary, and he considered that it might not be unserviceable to separate these two classes of matter by a permanent mark of distinction. He has endeavoured to embody the general principles of law in a series of propositions printed in large type; while the references to authorities, the historical and critical inquiries, the incidental points of law, and the presumed application of the wider principles to subordinate occurrences, are grouped together in the commentaries attached to these paragraphs. In writing a book, each man will generally adopt the method of arrangement which suits best with the distribution of his own matter; and in that which he has adopted, the author sought nothing more than an arrangement suitable to his own method of viewing his subject, which might or might not be conveniently employed by others. The plan has both advantages and defects. In separating the substance of the law from the critical matter, which is always neces-

sary for making its character and bearing on practice fully intelligible, it provides the reader at once with the condensed results of the critical investigation so far as the author has been able to extract them, and prevents the precise law as it stands from being mixed up with criticism on its former state, its presumed application to new circumstances, or an account of the steps by which it came to be what it is. When he peruses the general principle stated in large text, the reader knows the scope and bearing of the illustrative matter that is to follow, and may judge whether it is likely to contain any thing tending to suit his purpose.

The commentary in small type, which generally accompanies each general proposition, will thus be found to contain, not only the class of matter which usually appears in the notes of a law book, but likewise a portion of that which is generally embodied in the text. It was felt, that by this arrangement there might be occasional discursiveness without confusion, and that the statement of the general principle of law at its head, rendered the length of a critical inquiry into incidental points less productive of misunderstanding than it would be, were there no palpable distinction between what is laid down as law, and what is mere comment or illustration. It will perhaps be thought that advantage has been taken of this facility to pursue minute and comparatively unimportant points to too great a length. It was part of the author's object to illustrate his subject with the dicta of other writers, with inquiries as to the application of cognate branches of the law, and with decisions on those departments of the law of England, which might be considered the counterpart of the portions of the law of Scotland particularly under discussion. All these materials he wished his readers to consider as merely illustrative, and it was his desire to arrange them in such a manner as might preserve them from appearing to be stated as positive law. He holds that the decisions in the

English courts can never be cited as embodying the law of Scotland, unless where they refer to Writs of Extent, or any other department where the law of England and that of Scotland have been made identical by statute. In the present work, indeed, the English decisions are frequently referred to, as showing that particular branches of the law in that part of the country, rest on principles totally distinct from those of the corresponding departments of Scotland; and the author has frequently had occasion to observe, that an indiscriminate reference to English authorities, in some particular portions of the bankrupt law, has had a tendency rather to render ambiguous, than to illustrate the subject on which they have been adduced. Nor can he admit the views of commentators, however eminent, to be law, unless where, as may sometimes be the case with Stair and Erskine, they announce a principle which has been universally admitted to be law; and which is only not supported by decisions, because it has never been called in question in a litigation. Holding that, with the exceptions thus noticed, nothing is law unless it is embodied in statute, or the decisions of the higher courts, it was still expedient to refer to principles less authoritatively announced as illustrative of his subject; and in adducing these as separate from, and as merely illustrative of, the substance of the law, he found his method a convenient one.

On the other hand, the plan has its defects. There is much important law that cannot be embodied in general propositions. Decisions may have only affected incidental points, and their bearing may not be distinct enough to afford more than a presumption in favour of the general principle of law which they appear to support. For such cases it was necessary to make a provision, and sometimes it has been accomplished by stating the general proposition hypothetically; sometimes by a separate critical inquiry, as appeared most applicable to the particular occasion.

Wherever the law is embodied in statute, as in the instance of mercantile sequestration, the arrangement was found simple and apt. An analysis of a clause of the statute, with, occasionally, the principles of a leading case, formed the general proposition; and the beating of the provision on incidental questions, as illustrated by decisions, or by hypothetical criticism, constituted the commentary. It was where the law rested entirely on decisions, or on the dicta of the older commentators, that the defects of the arrangement presented themselves.

The author cannot conclude this cursory sketch, without expressing his sense of the kindness with which, whenever he had occasion to trouble his professional brethren on any subject connected with his work, his applications for information were responded to. He has particularly to acknowledge his obligations to Professor More, whose unrivalled acquaintance with legal literature, and kindness in communicating his stores, have been repeatedly taken advantage of in the preparation of this work.

THE
LAW OF BANKRUPTCY.

BOOK I.

RANKING OF CREDITORS.

WHEN the estate of an insolvent person is collected into a fund for distribution among his creditors, according to any of the several arrangements provided by law for that purpose, the general rules of ranking constitute the elements on which those charged with the distribution have to operate, unless, as in some cases under the sequestration act, there is a special rule of ranking provided for the occasion. The ranking of creditors is a subject more or less connected with almost every branch of the law, and it is sometimes difficult to draw a satisfactory line between those parts of the subject which illustrate the law of bankruptcy, and those that more properly belong to other departments. The foundation and execution of contracts, the laws applicable to the social relations, and particularly the whole department of the mercantile law,—all have more or less connexion with the claims of creditors, and the position in which they stand towards each other. In the present instance, however, no attempt is made to examine those laws relating to contracts and the constitution of property which form the foundations on which claims, as brought against bankrupt estates, rest. The object held in view has been simply to describe, and distinguish from each other, those classes of claimants who, on account of the special character of the rights on which they found, are not in the position of ordinary creditors, and to explain the manner in which their respective rights operate, when brought in competition with each other. With this view, it is necessary to describe the classes of debts which have a general privilege; the counter-claims that may be set off against debts; the claims that, either through the general operation of law, or by contract, individuals may have on property not in their own custody; the claims that in a similar manner may

exist in relation to property held for behoof of another ; and the rights vested in creditors, by the several steps of legal diligence for the recovery of debts. In thus covering the several subjects of general and particular preferences, compensation, diligence, and securities, it will be necessary to avoid entering into any account of the nature of these several grounds of ranking, farther than to examine their relation to each other, and the rights they confer on their holders in competition with other creditors.

The rules of ranking, made specially applicable by statute, to claimants under the sequestration act, are considered in the part of the work assigned to that subject.

CHAPTER I.

PRIVILEGED DEBTS.

(1.) *Funeral Expenses.*—The proper funeral expenses of a deceased person are a privileged debt against his estate, and, as such, have precedence over the landlord's preference for the current year's rent.

3 E. 9. 43.—Rowan v. Bar, 29th June 1742, M. 11852.—Crawford v. Hutton, 26th Nov. 1680, M. 11832.—Douglas v. Queensberry's Creditors, 16th Dec. 1674, M. 11826.—It is not known how far the privilege extends. This item of expenditure is of a character which creditors are loth to challenge, and the passion for conducting funerals more in accordance with the rank than the wealth of the deceased, which was perhaps the cause of discussion in the old cases, has in later times diminished. There would probably, however, be a distinction made between the case of an estate unexpectedly found insolvent, and that of known bankruptcy ; and in such a case as the latter, Professor Bell recommends the persons employed not to trust to the privilege, if a sumptuous funeral is ordered,—(2 B.C. 156.) It is matter of doubt whether the funeral expenses of members of an insolvent's family have any preference,—(2 B.C. 157.) In Auchinleck v. Dinmuir's Executors, 19th Feb. 1697, M. 11834, the court at first found a wife's funeral expenses preferable on the husband's estate. On a new hearing, "the Lords altered and found it but of the nature of a common debt ;" but this appears to have been on the specialty that the wife had possessed separate funds on which it was preferable. See also Marshall v. Finlays, 24th Feb. 1747, M. 3948, and Dicks v. Massie, 16th Jan. 1695, M. 5821. Mournings to the family of the deceased are part of the privileged debt of funeral expenses. In the

case of a married man it would probably be limited to mournings for the widow and the children living in the family. In *Hall v. Macaulay*, 19th Jan. 1753, M. 11852, the privilege was characterized as applicable "to such of the family of a defunct as must be present at the funeral." A widow who had added £200 a-year to her husband's income of £60 a-year, was allowed a preference to the extent of £50 on his insolvent estate for mournings, — *Buchanan v. Ferrier*, 14th Feb. 1822, 1 S. 322. It was found that a widow's claim for mournings was not preferable, when the marriage was dissolved within year and day, — *Neilson*, 21st Nov. 1776, M. 6165. See M. St. cclxi.

(2.) *Medical Attendance*.—The price of medicines, and the remuneration for medical attendance, incurred during the last illness of a deceased person, are preferable debts on his estate, which have been found to rank *pari passu* with funeral expenses.

3 E. 9. 43.—*Peter v. Monro*, 26th July 1749, M. 11852.—*Douglas v. Queensberry's Executors*, 16th Dec. 1674, M. 11826.—There is a *fiction juris* that physicians' fees are paid by anticipation, but this does not affect the preference for those incurred on death-bed; and where a physician made a claim covering a course of six years, it was restricted to the attendance during the death-bed illness, — *Sanders v. Hewat*, 19th Feb. 1822, 1 S. 333. No criterion of what is to be considered, for the purposes of this privilege, the death-bed illness, has been created. In *Park v. Langland's Representatives*, 7th Feb. 1755, M. 11421, the reporter presumes that the court took the period of the heir's privilege to challenge deeds to his prejudice, viz. sixty days, as the criterion, for the purpose of deciding the question whether the physician had action or not. In *Lawson v. Maxwell*, 12th Feb. 1784, M. 4473, (where the decision was laid on the ground, that, as the medicines were furnished in England, where there was nothing analogous to the privilege, it could not be given effect to), there were various opinions as to the time over which the claim of privilege might run; some saying it might extend to several months, others thinking it should be limited to sixty days.

(3.) *Servants' Wages*.—The wages of domestic servants, or farm servants, for the term current at the time of the death or bankruptcy of the master, are privileged; and in the case of farm servants, the preference takes precedence over the landlord's hypothec on the stock. Reapers and other occasional agricultural labourers enjoy the privilege.

3 E. 9. 43; Notes by Tytler and Ivory.—*Crawford v. Hutton*, 25th Nov. 1680, M. 11832.—*Melvil v. Barclay*, 23d Jan. 1779, M. 11853.—A. S. 23d Jan. 1779.—*Lockhart v. Pater-*

son, 14th Nov. 1804, M. *Privileged Debt*, App. No. 2.—The time of service, covered by the privilege, being the current term, its length will depend, sometimes on the special period of engagement, sometimes on the custom of the place. The decision in which the wages of farm servants were found to have precedence over the landlord's hypothec is *M'Glashan v. Atholl*, 29th June 1819, F.C. It proceeds on grounds specially applicable to farm servants, viz.—that they may be fed on the sequestered crop, and that they may be compelled to cultivate the farm for the landlord's security. It does not follow, therefore, that domestic servants have the same precedence. In the older case of *White v. Christie*, 31st Jan. 1781, M. 11853, the landlord was preferred even to farm servants.

Limits of the privilege.—In *M'Lean v. Shireffs*, 21st Jan. 1832, 10 S. 217, a person whose nominal profession was a gardener was admitted to a preference; but a portion of the court were in his favour on the ground that a gardener came within the rule as to domestic servants; another portion, because, as he assisted in sowing and reaping such part of a field of $5\frac{1}{4}$ acres as might be under crop, he came within the rule as to farm servants; the case thus does not establish a preference in favour of gardeners. In *White v. Christie*, 31st Jan. 1781, M. 11853, it was found, that where the master was both a farmer and a carpenter, while the farm labourers had a preference, the artisans employed by him in his latter capacity had none. In *Ridley v. Haig's Creditors*, 3d Feb. 1789, M. 11854, the superintendent of a distillery was found to have no preference. The same was found in *Marshall v. Philp*, 12th Feb. 1828, 6 S. 515, as to the mashman of a brewery, though it was pleaded that he was no overseer, but worked with his hands, and thus, as a producer of the commodity which was converted into the fund for distribution among creditors, presented the characteristic which justifies the farm servants' preference. In *Maben v. Perkins*, 3d June 1837, 15 S. 1087, a preference to a clerk, or shopman of a drysalter, by the trustee on a sequestered estate, was not allowed in his accounts.

(4.) *Rent.*—Erskine enumerates among privileged debts, “a year's rent of the house where the deceased died,”—(3. 9. 43.) There is just one decision on this point thus briefly reported,—“House rent for one year was found to be a privileged debt on the same principle with a servant's wages,”—*Dunipace v. Watson*, 5th July 1750, M. 11852. As the landlord generally makes good his claims through his hypothec, (see Ch. III. § 3.) the question whether, in the case of there not being sufficient hypothecated effects on the premises, he is preferable on the general fund of distribution, seems not to have elsewhere occurred. See M. St. ccclxii.

(5.) *Friendly Society.*—The money of a friendly society established under the statutes, in the hands of an office-

bearer, is in the position of a privileged debt; the person administering the office-bearer's property as executor, trustee, &c., is bound, within forty days after demand in writing, to pay such money out of the debtor's effects "before any other of his debts are paid or satisfied;" and the effects continue bound for the payment.

4 & 5 W. IV. c. 40, § 12.—Such money is not properly a debt of the office-bearer, but property in his custody which may be taken out of it; and the statutory declaration, that the circumstance of its being mixed up with the debtor's own property will not alter the ownership, will undoubtedly make the claim of a society preferable to any other privilege. On a corresponding clause in a previous statute (33 G. III. c. 54) the preference was found to exist where the money was deposited in bank by the presses, though the rules of the society required it to be in the treasurer's hands,—(Miller v. Brand, 10th Feb. 1825, 3 S. 518.) It has been held in England that sums lent to office-bearers or others on their promissory-note do not come within the act, and that it only applies to funds in the hands of office-bearers in their official capacity.—*Ex parte* The Amicable Society, 6 Ves. 98.—*Ex parte* Ashley, 6 Ves. 441.—*Ex parte* Ross, 6 Ves. 802.—*Ex parte* Stamford Friendly Society, 15 Ves. 280.—In *ex parte* Ray, 26th Jan. 1839, Mont. & Ch. 50, it was decided, that the circumstance of the treasurer being obliged to pay interest for a portion of the money did not take it out of the privilege, the obligation to pay interest being an article in the treasurer's appointment, and the whole being covered by the treasurer's statutable bond.

(6.) *Ministers' Widows' Fund*.—The rates made payable by the ministers' widows' fund act are declared by statute to be privileged debts, "and preferable to all other debts of the said ministers, heads, principals, and masters, not only upon their benefices and salaries respectively, but also upon their whole personal estate."

19 G. III. c. 20, § 19.

(7.) *The Crown*.—There is a preference in favour of the crown for arrears of assessed taxes. It only covers one year's duties, and, in relation to these, it affects all "moveable goods or effects whatever," of the debtor; and they remain liable though "taken by virtue of any arrestment, poinding, sequestration, or diligence whatever, or by virtue of any assignation on any account or pretence whatever."

43 G. III. c. 150, § 33.—By 52 G. III. c. 95, for the enforcement of this provision, persons selling goods by auction are required, three days before the sale, to send notice to the collector of the district. It might be said that this right partakes less of the character of a privilege than of a special hypothec over certain effects, like that provided by the excise acts. As it is not, however, like the excise preference, limited to specific subjects, it seems to be virtually of the nature of a privilege. It will not hold precedence, for the reasons stated below, over privileged debts, if there be the means of paying them, without a disposal of effects which would come within the prohibition.

(8.) *Relation of Privileged Creditors to the Crown.*—There is no decision on the question, whether privileged creditors have any preference over the crown's extent, or, in other words, are entitled to have their debts paid out of the effects found by that writ. There cannot be much doubt, however, that the crown is preferable. The doctrine is, that the property found in the inquisition is transferred to the crown from the date of the teste, if it was not previously transferred to some other person, (see below, Ch. III. § 6;) and, consequently, from the date of the teste, it ceases to be a fund for division among creditors.

Another question may be started, whether the crown is a privileged creditor, entitled, independently of any process or execution raised, to rank for its debts in preference to the ordinary creditors of the estate? There are, besides that which has been immediately above described, certain special preferences, partly in the form of lien, and partly in that of hypothec, conferred on the crown by statute, but, independently of statute or its special privileges in precedence of execution, the crown seems to have no preference. In England, tacit preferences, such as those which constitute privileged debts in Scotland, are not known. What is equivalent in English bankruptcy to the privilege for servants' wages, is a sanction to the commissioners to pay six months' wages from the bankrupt estate, (6 G. IV. c. 16, § 48.) It is usual to say in England that the crown is preferred for its debts over all other creditors; but the nature of this preference was not a tacit right to payment, independently of execution, following the debtor's property after it has gone out of his hands, but a prerogative right to anticipate other creditors proceeding to execution, and get before them, (1 Co. Lit. 131; 2 Co. Lit. 32.) The manner in which the crown might exercise this right was limited by 33 Hen. VIII. c. 39, § 74, the foundation of the present execution by extent, (see farther in Ch. III. § 6;) and unless the crown adopt the means of anticipating the subject there and in the other statutes provided, it obtains no preference. If the crown held in England a preference of the character of a privileged debt in this country, it would not be defeated by bankruptcy, but the assignee would hold the estate liable to the preference, as in the case of a creditor

holding a security; but unless the crown adopts the means of enforcing its privilege, it only gets a dividend with the other creditors. Even, however, if there were such a privilege in England, it would not necessarily extend to Scotland, because the 6th section of the 6th Anne, c. 26, which extends the law of England on this subject to Scotland, does not give the crown any new privilege as a debtor, but only conveys to it the English process as a means of recovering its debts; enacting that the debtors and their goods "should be liable, by extent, inquisition, and seizures, or by any other process, ways, or means, to the payment of said debts, duties, and revenues to the crown, in such and the same manner as is used in the Court of Exchequer in similar cases." Our own books afford no trace of any privilege to the crown as a simple creditor. The preference over individual creditors which the safety of the public revenue renders it necessary that the crown should have, appears to have been accomplished with us, as in England, not by giving the crown a privilege as a creditor, but by affording it facilities, not possessed by the subject, for the recovery of its debt. If some cases illustrate a disposition to give the crown a preference as a simple creditor, the circumstance seems to have arisen from a mistaken view of the English statute of Henry VIII. In the *Commissioners of Excise v. Northesk's Creditors*, Jan. 1724, M. 7873, "The Commissioners insisted for preference, because they commenced their writ before any of the other creditors obtained decree;" and they were preferred, on the ground of a reading of the 33d Hen. VIII. c. 39, § 25, which seemed to found the notion that the crown had a precedence in the judicial discussion of its debts as well as in execution,—a misunderstanding fully cleared up in the English case of *Giles v. Grover*, 9 Bing. 128. (see farther in Ch. III. § 6.) The same view seems to have been entertained in deciding, in the Court of Session, the case of *Ogilvie v. Wingate*, 29th June 1791, M. 7884, where the decision, postponing the crown's extent to the landlord's hypothec, was reversed in the House of Lords. In this case the crown had only obtained a decree, but the Court of Session treated the case as if it had proceeded to execution; and so the House of Lords, in reversing the principle of the judgment, remitted the case, "in respect that the king's title does not sufficiently appear in the process."

CHAPTER II.

COMPENSATING AND CROSS DEBTS.

SECT. I. COMPENSATION.

COMPENSATION, in its proper acceptation, arises from the balancing of simple pecuniary claims against each other, and their mutual extinction to the extent to which they correspond with each other in amount. There are some cases in which there is said to be such a mutual extinction where one of the parties is disabled by bankruptcy to fulfil his obligation, while, if both parties were solvent, it would not take place. Pure compensation, however, is not an instrument for getting payment of a debt, but an extinction of it, and it cannot be said to have place if its operation depends on the question whether a party is solvent or not. The right that arises to plead a counter claim in the case of the bankruptcy of a creditor, should more properly be called retention. The two pleas have, however, been generally confounded together, and it is necessary to treat under the head of compensation subjects that might more properly belong to retention.

(9.) In the ordinary case, and when both parties are solvent, the right of compensation, or of balancing or setting off a claim against a debt, can only arise when both debts are liquid, and parties would be entitled to immediate payment of them, if they did not extinguish each other.

1 St. 18. 6.; 3 E. 4. 15. In *Ewing v. Strathmore*, 18th Dec. 1825 (4. S. 310) affirmed 19th June 1832, 6. W. & S. 56, where bills against a party were found in a deceased agent's repositories, along with documents showing that they represented genuine debts, it was found that the agent's representatives were entitled to decree without abiding the result of a count and reckoning founded on vague statements of counter claims. A similar decision had been given in *Edwards v. Adam*, 24th May 1821, 1 S. 27. See also *Mitchell v. Mitchell*, 4th June 1822; 1 S. 451.—*Monro v. Monro*, 14th May 1823, 2 S. 300.—*M'Neill v. Falconer*, 2d July 1824, 3 S. 204.—*Hume v. Walkers*, 21st January 1826, 4 S. 383.—*Dun v. Craig*, 12th Nov. 1824, 3 S. 274.—*Mowat v. Denham*, 29th Nov. 1828, 7 S. 88.—*Hagart v. Stark*, 3d June 1830, 8 S. 852.—*Clarke v. Wilson*, 7th July 1830, 8 S. 1025.—*M'Cuaig v. Macaulay*, 22d January 1836 and 16th February 1837, 14 S. 318 and 15 S. 586.—*Macrae v. Macdowall*, 25th May 1839, 1 D. 817.—*Carruthers v. Thomson*, 11th March 1836; 14. S. 691. In *Thomson v. Thomson*, 18th Dec. 1829, 8 S. 267, action was raised on a bond of provision to a child against the representative of the granter. The claimant under the bond had been ignorant of its existence, and there were

pleaded against its debts presumed to have been incurred while its existence was unknown, for aliment during the claimant's minority, bills which were prescribed, and on which, though they were said to be for the accommodation of the claimant under the bond, the pleader of compensation appeared as acceptor, and other debts of a similar character; services, and other incidents, were pleaded as neutralizing these claims, and the debts being generally denied, the plea of compensation was repelled. In *Hamilton v. Wright*, 22d Nov. 1839, 2. D. 86, there was a charge for arrears on a bond, and a plea of compensation was repelled, because it resolved itself into "a general accounting on the details, as to which the parties are completely at variance on almost every point."

Damages.—In the general case, a claim of damages not constituted by decree cannot be pleaded in compensation against a liquid debt. Thus, in *Mackenzie v. Scott*, 4th Feb. 1830, 8 S. 436, where the sheep on a farm were transferred to a new tenant, and there was a portion of them the property of the shepherd who had charge of the whole, it was found that payment of a specific obligation for the value of these sheep could not be resisted on a plea of compensation arising out of an allegation that the shepherd had been negligent and unfaithful, and was liable to reparation for injury sustained by the stock while under his care. A similar decision was given in *Tait v. Mackintosh*, 26th Feb. 1841, F. C., where there was a claim for wages met by a counter-claim of damage committed by the person hired. But there seems to be a difference between such a case and that of a claim of damage arising out of the same contract as that which creates the liquid claim against which it is pleaded, and founded on the non-performance, or the imperfect performance of the obligation which is the counterpart of the pecuniary demand. Thus, in the contract of affreightment, payment of freight being the obligation on the one part, and the careful conveyance of the goods the obligation on the other, the ascertained amount of damage to goods may be set off against the freight. So it was found in *Taylor v. Forbes*, 2d Dec. 1830, 9 S. 113. The extent of damage, in this case, had been clearly ascertained, by the sound and damaged part of the cargo having been sold together.

(10.) *Bankruptcy.*—When there is a claim against the debtor of a sequestrated estate, he may plead compensation on the ground of a future or contingent debt as valued under the act.

This necessarily arises out of the right of retention, or, as it is vaguely called, compensation, which is the subject of more particular inquiry in the ensuing section, as a privilege held by the debtor of a bankrupt. To enable them to be balanced against each other, the precise extent of two counter-claims must be ascertained. This cannot be done unless they are liquid. A right of retention, however, existing from the time of the bankruptcy, on

the valuation of the contingent counter-claim, according to the 2d & 3d Vict. c. 41, § 39, it must immediately resolve itself into a right of compensation.

(11.) Compensation cannot arise if sequestration intervene between the concurrence of the debts, or if the party pleading compensation knew that the other was bankrupt at the time of the transaction on which the plea is founded.

Cauvin v. Robertson, 18th June 1783, M. 2581, Elchie's Notes, p. 102.—The sequestration act taking the estate out of the bankrupt's hands, as at the date of the first deliverance, effectually precludes concurrence. It is doubtful how far notour bankruptcy, where there was no knowledge of its existence on the part of the creditor when he became a debtor, will affect his plea of compensation; or how far, on the other hand, mere insolvency may affect it when the creditor knew of the insolvency. It will be seen farther on, that transactions for the purpose of raising the plea of compensation as a means of obtaining payment of a debt which would be otherwise unlikely to be paid, are discouraged. Such transactions, however, if there be bankruptcy, will generally be struck at by the act 1696, and they are considered in the commentary on that statute. In those cases where the debt is constituted before the bankruptcy, but is not acquired by the party pleading compensation until after it, as in the instance of indorsed notes, the question will be, whether the bankruptcy occurred before they were so acquired. An indorser, or cedent, who, by reason of the maker's bankruptcy, is only entitled to a dividend, cannot convey to an indorsee, or assignee, a right to operate full payment. Set-off in cases where the person against whom it is pleaded is bankrupt, is, in England, regulated by the 6 G. IV. c. 16, § 50, by which an intervening act of bankruptcy does not affect the right, unless the party was aware of the act.

(12.) *Trust Estate*.—A conveyance to a trustee for behoof of creditors will deprive an acceding creditor of the plea of compensation founded on his having obtained possession of a part of the trust estate, as against a debt which had been due anterior to the trust.

Meldrum's Trustees v. Clark, 13th Dec. 1826, 5 S. 122.—The grantor of the trust had subsequently given one of the creditors grain to sell, on the price of which he pleaded a right to compensate himself. Whether a non-acceding creditor could be precluded by the trust, would probably depend upon the question, whether the trust *qua* him was valid, and, consequently, whether it really was trust property that he had got possession of.

(13.) *Prescription*.—A claim struck at by the long prescription, cannot be compensated against an unprescribed debt.

3 E. 4. 12.—Carmichael v. Carmichael, July 1719, M. 2677. The concurrence of debt and credit had occurred before the expiry of the years of prescription. It is matter of doubt how far compensation is excluded by the operation of the shorter prescriptions. In Clark v. Buchanan, 6th Aug. 1773, M. 2664, the triennial prescription was found to preclude the plea—the counter-claim had prescribed before the concurrence took place. In Galloway v. Galloway, 12th June, 1799, M. 11122, the plea of the triennial prescription seems to have been admitted *simpliciter*. It is believed, however, that the person preferring a plea of compensation affected by the short prescription has the same right of reference to writ or oath as a person claiming on the debt. (See 2 B. C. 129.) In Baillie v. M'Intosh, 10th Aug. 1753, M. 2680, compensation was found to be defeated by the quinquennial prescription of the act 1669.

(14.) *Money lodged for Specific Purpose.*—Compensation arises out of questions between debtor and creditor; and where a person's right is other than that of a creditor—as where a depositor, or mandant, claims his deposit, or the performance of the special mandatorial act for which he has intrusted the other party with money, that party has no right of compensation over the property thus in his hands.

Stewart v. Buist, 16th Feb. 1770, M. *Compensation*, App. No. 2.—A party sent to another money to retire a bill with. There was an incidental impediment to his doing so; and having an account with the remitter, in which the balance was against the latter, he entered it to the remitter's credit. On the latter becoming bankrupt it was found that there was no plea of compensation;—the court held the money vested in the person for whose behoof it was sent. In Stuart's Executors v. Stuart, 16th July 1709, there was a legacy to two brothers, one of whom died before the will was executed. The trustees deposited his share with the other brother, who, in competition with other creditors, was found not entitled to hold it in compensation of a debt. The case of Murray v. Chalmer, 19th June 1744, M. 2626 would appear to be an exception to the principle, but the case seems to have been decided on specialties. The money was deposited to meet a demand by a third party if it should be made. The demand was not made, and the depositor of the money died. It was held, that with his death, his mandate having expired, the money, being in the possession of the mandatory, with no special purpose to which he could apply it, must stand as compensation of his own debt.

In England the application of this branch of the law of set-off seems to depend on the shape of the action in which it is adduced, *assumpsit* being an action in which a person who has money of the plaintiff in his hands, may always plead set-off. Thus in

Thorpe v. Thorpe, 8th May 1832, 3. B. & Ad. 580, a party received a sum of money and a bill of exchange, that he might discount the bill, and with the money pay a special debt of the remitter. He discounted the bill, and retained both sums for a debt due to himself. He was found entitled to plead the set-off in an action of assumpsit for money had and received. Mr Justice Parke said, "If the plaintiff had chosen, instead of assumpsit for money had and received, to bring a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages. But by bringing assumpsit for money had and received, he lets in the consequences of that form of action, one of which is the right of set-off." The decision was different in *Buchanan v. Findlay*, 7th July 1829, 9 B. & C. 738, where the party to whom the bill was remitted stopped payment, did not discount the bill and use the proceeds as directed, and refused to return it, while the remitter became bankrupt. The bill lying till maturity and being paid, the remitter's estate was found entitled to the proceeds on assumpsit for money had and received. The difference between this and the other case was said to be that the bill not having been discounted, was not money in the recipient's hand, but a document deposited for a particular purpose. It has to be observed that in England set-off is the creature of statute 2 G. II. c. 22, § 13; 8 G. II. c. 24, § 4; 6 G. IV. c. 16, § 50; 9 G. IV. c. 14, § 4.

When a sum sent for payment to a particular person cannot be held in compensation as against the party *by* whom it is sent, a question of still greater nicety may arise, viz., whether it can be pleaded in compensation of a debt by the party *for* whom it is sent? In *Campbell v. Little*, 13th Nov. 1823, 2 S. 484, an opinion was delivered, "that a plea of compensation is incompetent against a claim for money paid to an agent for behoof of his constituent," but there were other reasons in this case for rejecting the plea of compensation. In *Leslie and Thomson v. Linn*, 4th July 1783, M. 2627, it seems to have been held that an insurance broker may compensate money received for loss against debts due him by the insured. In *Campbell v. Campbell*, 11th Dec. 1781, M. 2580, it was found that a trustee could not set off funds of the truster which he had got into his hands against a debt due him by the truster; but there seems to have been collusion in the case. (See *Meldrum's Trustees v. Clark*, *supra*, p. 10.)

(15.) The party pleading compensation must be in his own right the creditor of the debt due by the other party: he cannot plead as compensating a demand against himself, a debt due to the person for whom he acts as tutor, agent, trustee, &c.

3. E. 4. 13. But see the extent to which there may be a sufficient concurrence of debt and credit in the case of agency, brokerage, partnership, &c., as discussed below.

(16.) *Husband and Wife*.—In respect to the goods in communion, a claim by a wife may be compensated by a debt due by the husband. But when a wife has a claim on any source as to which the *jus mariti* is excluded, the creditor cannot plead in compensation a debt due by the husband.

Wallace v. Lister, 18th May 1821, 1 S. 20, where a contract of separation was not sufficient to exclude the *jus mariti*. *Nisbet v. Rennie*, 18th Dec. 1818, H. 221. Here a sum as to which the *jus mariti* was excluded was heritably secured, and having been afterwards uplifted and incidentally mingled with the husband's funds, was lent out, on a promissory note in favour of the wife. The maker of the note could not plead compensation. In *Gairdners v. Royal Bank*, 22d June 1815, F. C., the wife's property was by antenuptial contract put into the hands of trustees. It was invested in bank stock, and the terms of the transfer, as well as of the receipts for dividends, were that the wife had an independent interest in the stock. It was found that the bank could not compensate this against a debt due to it by the husband. See *Goldie v. Napier, &c.* 12th June 1833, 11 S. 707. With respect to the converse of the above proposition, it has been decided in England that a debt due to a man in right of his wife, cannot be set-off in an action against him on his own bond. *Paynter v. Walker*, Buller N. P. 179. It has been found that a husband cannot set-off against his own proper debt, a debt to his wife before marriage.—*Ex parte Blagden*, Aug. 1815, 2 Rose, 249.

(17.) *Partnership*.—A partner of a company, when subjected to a personal demand to pay a debt due by the company, may defend himself by the plea of compensation on a debt due to himself by the claimant.

The principle, as above stated, seems to be generally admitted. How far it may be widened so as to admit such compensation whether there is a personal claim or not, or whether the right is not properly one of retention, are subjects of dispute. In the last case on the point, *Lockhart v. Ferrier*, 25th May 1842, 4 D. 1253, (to be taken in connexion with the previous case of *Lockhart and Swan v. McNeill*, 30th Nov. 1839, 2 D. 174,) the difference between a claim against a partnership and one against a partner, was virtually kept in view, though it was surrounded by specialties. It was held that the partner was not precluded from pleading compensation because he had not adduced the plea during the constitution of the debt against the company; and, subsequently, in a multiplepoinding, his copartner being bankrupt, it was found that he might plead compensation. Lord Moncreiff said, "The principle is simply, that when payment of a debt due by a company is demanded, the partner on whom person-

ally it is to fall as subsidiarily liable for it, is entitled to plead compensation or retention on a debt due to him individually by the creditor in the company's debt, because he is at all times entitled to pay and discharge the company's debt in so far as he is himself liable for it."

A question arises, to what extent can a partner enjoy the plea? Is it to the extent to which there is a claim against him, or that to which he is ultimately liable? If the latter be the extent of his privilege, he may compensate against the whole debt, for he is ultimately liable for it all; and if the plea be not compensation, but, as above hinted, retention, it cannot easily be supposed to be otherwise than for the whole debt, for retention is, in its nature, a security against ultimate obligations, not an extinction of co-existent debts; and if it exist for a moment for any part of the debt, it must exist for the whole. There is no part of a company debt as to which it can be said of a partner that he may not be ultimately liable for it, and if he have a right of retention for his prospective liability, there is no part of the debt which can be excluded from its operation. It is held, however, that a partner is not like a cautioner, ultimately liable, but that he is primarily liable for the whole debt. Carrying out this view, there are two liquid debts set off against each other, and in such a case the plea cannot be retention—it must necessarily be compensation.

We thus evolve one clear proposition, that when a partner is pursued for a company debt, the extent of the demand is the measure of his right to plead compensation in virtue of any debt due to himself. When it is asked how far the right of compensation, or the mutual extinction of debts, exists before the partner is urged for payment, the question is of difficult solution, and it is found that the decisions have not exhausted it. In *Boyle's Trustees v. Ballantyne*, 8th July 1793, M. 2581, the question would appear at first sight to have been settled. There were two solvent partners of a company. Action was raised against both for a company debt. One only appeared, and he pleaded compensation through a private debt in which he was creditor: the plea was admitted. It is given as the view of the majority, "that, in determining the question, there was no occasion to inquire whether the company was solvent or insolvent, dissolved or not dissolved, for in all these situations the same rule would hold: that when a creditor pursues a company for payment, he cannot prevent any one partner from standing forward and discharging the debt, although out of his own private funds. That, on the other hand, a creditor has it in his power to demand payment *in solidum* from any individual partner, without discussing the company. And as every partner, therefore, may not only make an ultroneous offer, but may even be compelled to pay, so he also must be entitled to plead compensation, it being a general rule that the obligation to pay implies a right to compensate."

The authority of this case has, however, been much questioned. Professor Bell (2 B. C. 666) refers to it as containing a rule

only applicable to dissolved partnerships. But there were here two *cores*, who constituted a virtual partnership in respect of responsibility. Their obligations to the public were not affected by the dissolution, and it is difficult to see how the extinction of these obligations could be affected by it. Lord Meadowbank, in a note on the case of *Scott v. Hall*, (2 B. C. 668,) limited the doctrine in Boyle's case to a right to compensate to the extent to which the partner was sued; but the decision certainly goes farther, for there were two partners pursued, and one of them was allowed to plead compensation of the whole debt. In *Scott v. Hall*, 15th June 1809, M. Syn. 194, there was only one surviving partner, in whom the whole liabilities and rights of the company were vested, and he was allowed to plead a private claim against a company debt.

If the principle appearing on the face of Boyle's case be law, that when several partners are individually pursued for a company debt, any one of them can come forward and plead compensation for the whole against a private claim, it would seem a legitimate inference that there is an inherent right to plead compensation—a right to hold that the debts extinguish each other—*anterior* to, and independently of the demand being made against a partner. If there be such a right the next question is, what is the extent of it? Does it cover the whole debt, or merely the partner's share of the debt? There does not appear to be any principle on which the right, if admitted to exist, can be limited so as not to cover the whole debt. Its foundation is the partner's primary liability, and the partner's liability is for the whole debt as much as for any given part of it. It would be almost impracticable to determine a ratio for dividing the responsibility. If there be five partners and a company debt of £500, shall it be said that each partner may set off against it a private debt of £100 and no more? The sole ground for such a principle would be that their right to plead compensation should be commensurate with their proportional interest in the concern. But it may happen that one partner has four-fifths of the interest in the concern, and the remaining four have one-fifth divided among them; and if the principle were carried out, he might be allowed to plead compensation to the extent of £400, while the others could only plead it to the extent of £25 each. It would thus be the result of any limitation on the extent to which a partner may plead compensation, that it would involve, in a question with a third party, an opening up of the respective claims of the partners against each other—a practice inconsistent with the principles of the law of partnership.

(18.) A company cannot plead compensation on a debt due by its creditor to an individual partner of the company.

Mahon v. Christie, 8th Feb. 1844, 6 S. 619.—In *Downe, Bell, and Mitchell, v. Pitcairn*, 24th June 1829, App. 3. W. & S. 472, a shipping company in Edinburgh entered into a contract with wharfingers in London. The shipping

company brought an action of count and reckoning against the wharfingers, on which a balance against the latter was reported. Against this the wharfingers adduced a balance said to be due to a member of their company, whose name was in the firm, who had previously acted as wharfinger for the other party, but with whom there had been no settlement when the contract was entered on; but the plea was disallowed. Professor Bell says, "Where a demand is made against a company, and all the partners are solvent, there seems to be no impediment to the company so arranging with a partner, to whom the creditor of the company is indebted, as to set forward the partner to pay, and so extinguish the demand against the company by the partner's debt, making the partner creditor to the company: for an express assignation by the partner to the company would have this effect; and to such assignation, while parties are solvent, there could be no objection." (2 B. C. 664.)

(19.) A debtor of a company cannot plead compensation on a debt due to him by an individual partner.

Morrison v. Hunter and Ross, 5th Dec. 1822, 2 S. 68.—(See the same doctrine in the English case of *France and Hill v. White and Williams*, 8th Nov. 1839, 6 Bing. N. C. 33.)—A partner is bound for the debts of the company, but the company is not bound for those of the partner. It would seem, however, that the converse does not hold, and that a partner, when pursued, may plead a debt due by his creditor to the partnership.—*James, &c. v. Downie*, 15th Nov. 1836, 15 S. 12. This was a special case,—a disposition was granted to a partner in consideration of future advances. The advances were made not by him but by the company. He sold the property, and the question was, whether the money in his hands could be attached by other creditors, or compensated the company's advances? The Lord Ordinary (Moncreiff) said,—“Take Downie [the partner] to be in possession, with a right of retention or compensation for any debt due to himself, can any sound reason be assigned why he should not retain for the debt due to a company of which he is a member, by advances made by them to Gilchrist at his desire, for which debt he might have to bring an action the next day?”

(20.) A debtor of an individual partner of a company may plead compensation on a debt due to him by the company.

This is a necessary consequence of the liability of a partner for the company's debt. The principle was clearly evolved in *Russell v. M'Nab*, 26th May 1824, 3 S. 63. In *Salmon v. Padon*, 17th Dec. 1824, 3 S. 406, there had been two companies formed of the same partners, and against the share accruing to a partner on the dissolution of one of them, there was compensated a proportion of certain advances made by another of the partners for the other company. In *Christie v. Keith*, 29th June 1839, 16 S. 1224, this compensation was admitted.

(21.) After the dissolution of a company, debts that were due to it, and the debts due by an individual partner, do not compensate each other, unless to the extent of the individual partner's interest.

Oswald v. Dickson, 3d Dec. 1833, 12 S. 156, where one of two partners, after the dissolution, was not entitled to receive payment of a debt to the company, and credit the whole of it in compensation of his own claim—he had to pay over a half. In *Anderson v. Rutherford*, 19th Feb. 1835, 13 S. 488, a debtor of the partnership, after he knew of the dissolution, employed one of the ex-partners to negotiate for him a loan of money to be employed in paying the company's debt. The money was borrowed, but not so employed; and it was found that it could not be pleaded in compensation of the debt. Of course it will often be a question whether, in reference to a debtor of a partnership, his knowledge of the dissolution is such as to preclude his payment to the partner from being legally payment to the company. In England it is held that a sole surviving partner may set off debts due to the company against claims on himself. *Slipper v. Stidstone*, 5 T. R. 493. *French v. Andrade*, 6 T. R. 582.

(22.) A partner who is the creditor of another, cannot compensate himself from that partner's share in the stock, in competition with other creditors.

Galdie v. Gray, 16th June 1774, M. 14598. There were various pleas urged, and compensation was one of them. It was remarked that there was no *concursus debiti*, &c. The contract of copartnery bound each partner's stock to remain unwithdrawn so long as there was any claim by the company, or by the individual partners, against him, unsatisfied. It was therefore pleaded, that the stock being in the custody of the company while a debt to an individual partner by the proprietor of it was unpaid, the individual partner might set off his private claim against a demand on the stock by a third party. But it was found that the stock could not be in this manner hypothecated to the prejudice of creditors, and that it was not legally in the possession of the company.

(23.) A debt due to a company may be compensated by a debt due by another company consisting of the same partners.

Williams' Trustee v. Inglis, Borthwick Gilchrist & Co. 13th June 1809, M. Syn. 193.—The individuals under one firm conducted the business of bankers—under another, that of linen-drappers. The party for whom compensation was pleaded had a deposit in their bank, and had granted an acceptance for goods purchased.

(24.) A partner may plead advances made for a com-

pany against a demand on him by the company, but a person bound by the contract of a joint-stock company to pay up certain instalments, cannot set off against a demand for them advances made on behalf of the company, where it does not appear that the full amount of subscribed stock, if paid by the other partners, would meet the obligations of the company.

Turner v. Molison, 30th May 1833, 11 S. 669.—It was not alleged that the paid-up instalments would meet the obligations; but it may be questioned how far the obligation to pay up instalments can be compensated in any case.

(25.) *Insurance*.—In insurance, the risk is undertaken not upon the credit of the payment of the premium, but its actual payment. From the time, then, of the execution of the policy, if the premium be not paid, it is not properly a debt due by the insured, but money the property of the underwriter, of which he is custodian, and thus, not being a debt, it cannot stand as compensation against a claim for loss.

Ferrier v. Sandieman, 29th June 1809, F. C.—Lillie v. M'Kissock & Co. 24th Nov. 1818, F. C.—The premium is presumed to be paid, and the policy discharges it. In both the above cases the claims for loss were disputed; and perhaps it would be more distinct to say that the insured has no retention, but the term generally used is compensation. In the case of a decree constituting the amount of the loss, it may be questioned if the plea of compensation would be excluded.

(26.) A premium of insurance cannot be compensated against a disputed loss on a previous policy, though it was underwritten by the same parties who undertake the new one.

Allan v. Hynd, 2d March 1830, 8 S. 612.—The right in any circumstances to hold a debt against a disputed claim is, properly speaking, retention rather than compensation; but the principle on which the case was decided was avowedly that of compensation, for it was pleaded that the claim was liquidated *cum processu*, and it was remarked on the bench that there was evasion on the part of the Insurance Company. The Lord Ordinary (Moncreiff) said,—“Strictly, all premiums of insurance ought to be paid when the insurance is effected; and though, in practice, they may not be actually paid by the insured, they are truly advanced, or reckoned as advanced, by the brokers or agents, in periodical settlements with the underwriters. The policies then remain with these agents, as brokers; and if there is an effective insurance at all, it is plain that the policies must be considered as held

by them, as agents *quoad hoc* for the insured; for, without a premium paid, actually or constructively, there can be no insurance; and without a policy in possession, legal or constructive, there is no insurance." It would appear, however, that although there is not room in questions between a creditor for the premium and a creditor for loss, for such a concurrence as will admit of proper compensation, there is room for the intervention of the principle of retention, if the underwriter should become bankrupt when loss has occurred. See *Kirk v. Bennet*, 1st Dec. 1812, F.C.

The subject of compensation in questions of insurance, where underwriters, brokers, and insured parties are concerned, has been examined by Professor Bell, on the analogy of English cases, there being few illustrations of the subject in our practice. As matter of speculative doctrine he is of opinion, 1st, That in the case of the failure of a broker who is indebted to the insured, the latter may, on the ground of the assent conveyed in the discharge in the policy, hold the premium compensated by the debt; but he questions if this would be the result were the balance against the broker to arise out of transactions of a separate character from insurances; and whether the underwriter's right to demand the premium would not be preserved in such a case, notwithstanding the state of accounts between the broker and the insured. 2d, That with respect to questions between the broker and underwriter, if the broker have special authority to settle returns and losses, he may hold premiums in compensation of return premiums and losses, but not otherwise.—(2 B.C. 132-138.)

It is a settled principle in England, that on the single transaction of the insurance, the premium, as against the underwriter, is presumed to be paid, as the policy bears it to be, and that he cannot plead the premium as a set-off against a claim for loss, unless he found his plea on the particular state of accounts of the underwriter, broker, and insured, with each other.—*De Gaminde v. Pigou*, 4th Feb. 1812, 4 Taunt. 246.

(27.) *Agents, Factors, &c.*—When a factor deals with the effects of his principal in his own name, and the party he deals with has no reason to presume that he does not act for his own behoof, that party has a right to compensate against debts arising against him in such transactions, debts due to him by the factor.

This has generally been found in the case of a factor consigning his principal's goods as if they were his own, as in *Johnston v. Scott & Son*, 14th Nov. 1818, F.C. This case is full of specialties tending to elicit the question whether the circumstances were sufficient to establish that the consignee held the transaction to be for the factor's behoof. The same had been decided in *Baxter v. Bell & Maxwell*, 17th Dec. 1800, M. *Compensation*, App. No. 4. In *Fleming v. Findlay*, 20th June 1832, 10 S. 739, it was held that the purchaser must have been aware of the agency.

The principle was admitted in *Gall v. Murdoch*, 19th June 1821, 1 S. 75. A different principle ruled in the old case of *Belches v. Johnstone*, 31st Jan. 1770, M. *Compensation*, App. No. 1; and in *Alison v. Fairholms*, Nov. 1765, M. 15132, where money deposited in his own name in a bank, by an agent, was found not to ground a plea of compensation: but it does not appear to have been satisfactorily ascertained that it was the complete understanding of parties that the agent was the owner of the money. (See 2 B. C. 132.) The principle as above stated, has long been held law in England—See *George v. Clagett*, 30th June 1797, 7 T.R. 359, and cases of an earlier date there cited. In *Baring v. Corrie*, 13th Nov. 1818, 2 B. & A. 137, Lord Tenterden took a distinction between a factor and a broker. The former is in possession of the goods, the latter acts as a middle-man, who negotiates between the parties. To allow set-off to be pleaded in the instance of a broker, it was held that it would be necessary to bring forward special circumstances to show that the purchaser was fraudulently induced to deal with him, not as a broker, but as an owner and dealer. The right of set-off against a factor is acknowledged, and made an exception to the principal's right to recover his goods from the person in whose hands they are placed by the agent, by 6 G. IV. c. 94, § 6.

(28.) When an agent has pledged the property of his employer under the Factors' Act, if the agent become bankrupt, the employer, redeeming the effects according to the act, is held to have paid the money for the agent's behoof before his bankruptcy; or not redeeming them, is held a creditor of the agent for their value as at the time of pledging; and is in either case entitled to plead compensation as for the redemption money or the value.

5 & 6 Vict. c. 39, § 7.—The words of the act are,—“that in case of the bankruptcy of any such agent, the owner of the goods which shall have been so redeemed by such owner as aforesaid, shall, in respect of the sum paid by him on account of such agent, for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy; or in case the goods shall not be so redeemed, the owner shall be deemed a creditor of such agent for the value of the goods so pledged at the time of the pledge; and shall, if he shall think fit, be entitled in either of such cases to prove for or set-off the sum so paid, or the value of such goods, as the case may be.” The phraseology of the act applies to English law, but its effect would certainly be to count the redemption in the one case, or the charge for the value of the goods in the other, as going back to a time anterior to that when compensation would be intercepted by the bankrupt laws, and consequently anterior to the first deliverance in a sequestration.

The Factors' Act, 6 G. IV. c. 92, was passed to validate the general transactions of factors with third parties in reference to

the goods intrusted to them. The statute, however, not being found sufficient to cover transactions for creating securities over such goods for advances, or exchanges made in securities, the act of 5 & 6 Vict. was passed to supply the deficiency.

(29.) *Workmen*.—Compensation of the price of commodities sold by a manufacturer, against wages claimed by his workmen, is excluded by the acts against the truck system, in the manufactures to which they apply.

12 Geo. IV. c. 34; *Monteith & Co. v. Blackie*, 2d Feb. 1827, 5 S. 280; 1 & 2 Wm. IV. c. 37.

(30.) *Farm Produce*, after the landlord's hypothec has ceased to affect it, is not in such a manner in the landlord's possession, from its remaining on the farm, that he can, on the ground of an obligation to buy it, compensate its price against arrears of rent.

Stewart v. Rose, 2d Feb. 1816, Hume, 229.—The tack bore that the landlord should take the last year's hay crop. The tenant was in arrears, and the landlord pleaded his right to the hay, against that of a poiding creditor, that he might so far compensate the arrears.

(31.) *Concerted Plea*.—A plea of compensation cannot be raised on the price of property purchased from a debtor on the understanding of a cash payment, when the purchase is made with the view, on the part of the purchaser, of pleading the price against a litigated claim.

Finlayson v. Russell, 4th June 1829, 7 S. 698, where the pursuer of an action went to a sale by the defender, at which it was stipulated that purchasers should pay by cash or bills before receiving the articles, and having bought and carried off effects, propounded the plea of compensation. In *Munro v. Hogg*, 14th Dec. 1830, 9 S. 171, the assignee in a cessio was about to bring the debtor's furniture to sale, when he was treated with by a person professing to come forward as a friend of the debtor, to whom he agreed to sell the effects by private bargain. This person unsuccessfully pleaded, against a demand for payment, an old executed poiding over the furniture.

Questions with the Crown.

(32.) The English authorities tell us that set-off cannot be pleaded against the crown, because it is a plea created by statute, and the crown is not mentioned in the statutes, (*West on Extents*, 200.) It would appear, however, that there may be cases which would come within our term compensation, which might there be pleaded independently of the statute, as we are told that every defence that can come under the plea *non indebitatus*, may be stated against the crown. (Ib. 201.)

There does not appear to be any reason why, in Scotland, compensation should not be pleadable so as to limit the inquisition of an extent to the balance due to the crown, but it is difficult to suppose a concurrence of debt and credit between the crown and a subject, because every claim which the subject can have against the crown, as for an overcharge of duties and corresponding levy, is necessarily a disputed, not a liquid debt.

(33.) Compensation may be pleaded to an extent of the second degree against a party who is debtor to a crown debtor, so that the accounts between the two being balanced, the extent can only find what the former is owe to the latter, after deducting what the latter is owe to the former.

Ross v. Drummonds, 3d March 1841, 3 D. 698, where the settlement of this principle on the opinion of English counsel was a preliminary to a decision which involved other matters of law. Persons who were army agents, paid the proceeds of drafts by the paymaster of the forces for paying military salaries, into the hands of their bankers; and the question was, whether the sum was to be held as at their credit in striking a balance between them and their bankers on the day of deposit, and as in that position excluding an extent. The bankers only knew the sum as cash paid; it was observed, that if the original drafts had been deposited, or the bank had known that the money was the crown's, a different view might have been taken.

(34.) *Competent and Omitted.*—If there was a concurrence of debts, and one of the parties has notwithstanding failed to plead the concurrence in a litigation, it is not available to him after decree.

1592, c. 141. Wright v. Sheill, 25th July 1676, M. 2640.—Naismith v. Bowman, 5th Dec. 1710, M. 2645.—In Downie v. Rae, 20th Nov. 1832, 11 S. 51, one who had been cautioner in a cash credit held funds of the debtor, on which he was made the nominal raiser of a multiplepoinding, in which he gave in a condescendence. After decree he was not allowed to plead compensation arising from liabilities under his guarantie of the cash credit, though he alleged that he had been ignorant of any claim having arisen against him. A debt bought after decree will not create compensation.—Gordon v. Melvil, 9th July 1697, M. 2642.—Paterson's Creditors v. M'Aulay, 9th Dec. 1742, M. 2646.

(35.) *A Discharged Bankrupt.*—If the creditor of a bankrupt was likewise his debtor, so that compensation might have been pleaded against his claim on the bankrupt estate, the bankrupt cannot after his discharge, and when, so far as relates to his claim against the estate, the cre-

ditor has only got a dividend, pursue him for the full counter debt.

Baillie v. Young, 22d Dec. 1837, 16 S. 294. This was a very peculiar case. The bankrupt had been discharged on a composition contract. Having paid a composition on certain bills, he obtained decree for a debt in an action against the person standing in right to them, the cause of action having arisen before the sequestration. It was on these facts found by verdict of a jury, that the bankrupt's discharge was fraudulently obtained, and it was reduced *quoad* the interest of this particular creditor. The result was, that compensation being allowed to act, the bankrupt was found to be still debtor in the excess of the claim against him over that for which he had obtained decree against the creditor, deducting the amount of the composition. When there is a concurrence of debts before bankruptcy, it is essential to the principle of compensation, that neither the creditors at large, nor the bankrupt himself should be entitled to exact full payment and give only a dividend in return.

SECT. 2.

RETENTION OF MONEY.

Retention distinguished from Compensation and Lien.—The proper foundation of the law of compensation is, not that the party pleading it has a security for payment of his debt, or is in possession of a fund out of which he may pay himself, but that by the concurrence of debt and credit both debts are paid and extinguished. It is hence a necessary element in the operation of compensation, that both the debts should be liquid at the time when the compensation exists. But there are circumstances in which a person may retain money he is due to another in security for a liability of that other person not yet liquid and exigible; and as this cannot proceed on the principle of a mutual payment and extinction from the moment when the right is pleadable, it is necessary, for the avoidance of confusion, to consider it apart from the law of compensation, although it generally resolves itself into the same result, by the debt that is retained being set off against the contingent debt when the latter becomes due. The resolution of retention into compensation may be illustrated in the case of bankruptcy. When A becomes insolvent, B, his debtor, refuses to pay his debt, because he has a contingent counterclaim against A. On A being sequestrated, B gets this contingent claim valued, and as both the debts are then liquid, compensation has place.

In a very learned note on the subject of retention, Professor More has shown that the original law on this subject in Scotland has been involved in confusion by an attempt to assimilate the doctrine of the retention of money with that of set-off, and the doctrine of retention of commodities with that of lien, as

these subjects are respectively viewed in English law, (see Notes to Stair, cxxxi.-cxxxvi.) Admitting the necessity of a revisal of the whole subject, there are certain distinctions between retention of money and retention of moveable goods, which render it convenient to separate the two from each other, and to consider the former in connexion with compensation, while the latter comes in connexion with other securities. 1st, Retention of money may, and generally does, resolve itself into an extinction of mutual obligations, and it is sometimes not clear at what precise point such extinction takes place; retention of commodities is from first to last a security for payment, and can only be converted into payment through some extraneous process. 2d, Retention of money arises out of a question regarding mutual debt and credit, and the money retained must be proportionate to the retainer's claim; but in retention of commodities, or lien, the property retained in security may be quite disproportionate to the retainer's claim, as in the case where a carrier uses his lien over a valuable commodity for the cost of conveyance. 3d, In retention of money, that which is retained, and the retainer's counterclaim, need not be connected with one transaction or series of transactions. It is sufficient that the party exercising the right is due money to the other as a debtor, and does not hold it as a depositor or trustee, however the debt may have originated. 4th, Retention of commodities or lien is generally the counterpart of a liquid debt, while the peculiarity of retention which distinguishes it from compensation is, that it may be exercised by a person whose claim is not liquid. See chap. III. sect. 2.

(36.) *Cautioner*.—A person who has come under a pecuniary guarantie or cautionary obligation for another, is entitled to retain any money he may be owe to that party, until he is relieved of his obligation.

Queensberry's Executors v. Tait, 23d May 1822, 1 S. 427.—*Boswell v. Montgomerie*, 23d Feb. 1836, 14 S. 554.—*Irvine v. Menzies*, 10th July, 1711, M. 2686.

See in next section, the relation which such retention may have to questions of cross-ranking.

(37.) *Claim in Bankruptcy*.—A person who is creditor in a future or contingent claim, and who, on the other hand, is owe the future or contingent debtor a liquid debt, may, if that person become bankrupt, retain the liquid debt, as security, or eventually as compensation, of the future or contingent debt.

Ferrier v. British Linen Co. 20th Nov. 1807, F. C.—There was a balance against the bank in their account with a sequestrated estate, and the bank was found entitled to retain the amount of a bill drawn by the bankrupt and discounted at the bank's agency,

which had a period to run at the time of the bankruptcy, and was dishonoured. See *Christie v. Keith*, 29th June 1838, 16 S. 1224. — *Curtis v. Chippendale*, 9th Dec. 1794, M. 2589. — This subject has not, in the decisions, been properly disentangled from questions of compensation. Professor Bell treats this branch of retention under the head of compensation, simply observing "But this [the rule that both debts must be liquid in compensation] is a rule which holds strictly only while the parties are solvent. If one of them become bankrupt, the other may defend himself against a present demand, by setting off a debt that is future or contingent, although the term of payment be after the bankruptcy," (2 B. C. 128). From the absence of any satisfactory series of decisions bearing on the subject, and treating it purely as retention, it is impossible to say at what precise point in the progress of bankruptcy the right of retention commences,—whether notour bankruptcy be necessary to bring it into existence, or it be a right which, like stoppage in transitu, may be exercised for a party's security when he finds that the other party is insolvent. In the case of sequestration the right may, as above, (p. 9) resolve itself into compensation.

(38.) A sum which is instantly payable in consideration of the undertaking of a contingent obligation, cannot be balanced against the contingency, even if the obligor become bankrupt, and it has been specially found that a party insured cannot, while the risk is undetermined, compensate the premium against the contingency, on the underwriter's bankruptcy.

Selkrig v. Pitcairn, &c. 14th June 1808, M. App. Insurance, No. 10. See above, p. 18, as to the operation of compensation in such cases.

(39.) *Bill*.—It is held that the person who is responsible on the face of a bill for behoof of another, has retention of any debt due by him to the person accommodated, which will operate in the case of a mutual bankruptcy, in which the bill ranks on both estates.

Christie v. Keith, 29th June 1838, 16 S. 1224. See this case examined in connexion with the question of double ranking, in the following section; and see *Curtis v. Chippendale*, 9th Dec. 1794, and 23d Feb. 1797, M. 2589, as there animadverted on.

(40.) *Tenant*.—A tenant under lease, in which payment for meliorations is stipulated, may retain the rents from the time when the obligation becomes prestable, and pay himself.

Arbuthnot v. Colquhoun, 5th Feb. 1772, M. 10424.—

Stewart v. M'Rae, 12th Nov. 1834, 13 S. 4.—*Stewart v. Campbell*, 12th Nov. 1834, 13 S. 7.—In *Morison v. Patullo*, 3d Feb. 1787, M. 10425, it was found, that where the lands were sold, retention could not be pleaded against the seller landlord, when the meliorations were made between the entry of the purchaser and the falling due of the rent. The cases show that when the meliorations have been made and the debt is future, the rent is subject to absolute retention against any party holding right to it. It appears, too, that there may be retention on the ground of failure on the part of the landlord to provide the meliorations he has engaged for. In *Bowie v. Duncan*, 2d Dec. 1807, (H. 839,) a tacksman in the first year of his lease pursued for erection of certain steadings and for possession of pasturages, and attempted to retain the first instalment of rent. It was found that he was not entitled to do so, as he would have opportunities of retention (or perhaps compensation) when the damages were constituted. See also *M'Rae v. M'Pherson*, 19th Dec. 1843, 6 D. 302. In *Turner v. Nicolson*, 6th March 1835, 13 S. 633, a letter during the currency of a lease, agreeing to allow at the end of the lease a sum for ameliorations, was found, as not being part of the lease itself, insufficient to establish a ground of retention which would affect a singular successor.

(41.) *Retention and Compensation*.—A right of retention may be pleaded against a right of compensation, so as to awaken in the person against whom compensation might be otherwise pleaded, his right as a creditor.

Irvine v. Menzies, 10th July 1711, M. 2686.—A person pursued on a bond pleaded compensation as holder of a bill against the bondholder, who in his turn pleaded retention as having been cautioner for the bill-holder, and the plea was allowed. The principle was acted on in *Christie v. Keith*, 29th June 1838, 16 S. 1224, noticed below, p. 34.

SECT. 3.

CROSS BILLS.

Introductory Notice.—Of all departments of the bankrupt law, that of adjusting the ranking of bills of exchange and promissory notes, when the several parties connected with them become bankrupt, has been least satisfactorily adjusted by decisions. The simple view, that the parties should be held as standing to each other in the relation of debtor and creditor, precisely as they did on the face of the documents, at first naturally suggested itself. But when documents came to be examined in connexion with the transactions out of which they had arisen, it was found that where two or three cases were the exact counterparts of each other, in as far as respects the apparent obligations on the face of the documents, the relation as debtor and creditor, which a farther

examination showed that the parties really bore to each other, was so distinct in the several instances, that any rule so taken from the apparent position of parties on the face of the documents was found to be inapplicable in practice. When four or five estates were found to have been involved in complicated bill transactions, partly onerous, partly accommodation, there were, when the variety of the characters which even the onerous transactions assumed were subjected to farther variation by the influence of fictitious or accommodation paper, so many diversities of relative position, that the rule made for one set of cases was found totally inapplicable to another.

The Scottish cases on this subject are not numerous, and they are not much respected by our own writers. The English cases, if they were to be held as of any authority here farther than in the way of illustration, would not by any means afford a clear series of rules exhausting the subject, and would only afford matter for an isolated proposition being derived from each case, which may be considered as law to govern any case precisely similar, but scarcely as containing any general principle which can be safely extended to embrace general classes of cases. Indeed the most profound lawyers, and those who have seen farthest into the probable practical effect of any general rules, have been the most diffident in laying them down. The veneration with which English jurists in all other cases contemplate the views of their predecessors, seems to have been totally abandoned in this department of the law. Not only do the commentators freely attack the decisions of the courts, but the most eminent judges speak without much respect of each other's views. Lord Eldon, characterizing the judgment of Lord Loughborough in *ex parte Walker*, said, "I have no difficulty in saying that I never understood it. I am satisfied that though, no doubt, the court understood that judgment, yet none of the counsel did."—(Jacob, 278.) And he made the general remark, "All such cases have distressed me exceedingly. The cross-paper alarmed the court. It did not know how to deal with it. It did not untie the knot, but it cut it." Whoever wishes to see how much those who, as judges, were bound to come to a decision on the cases laid before them in this branch of the law, have, in performing this duty, perhaps to the best of their ability, laid themselves open to have almost every principle they could lay down proved to be erroneous by an ingenious reasoner, may consult Christian's Bankrupt Law, II. p. 364, *et seq.* On the other hand, for a careful analysis of most of the cases on the point, accompanied by a very guarded attempt to embody the principle which appears to have ruled in each, he may consult Bayley on Bills, p. 422, *et seq.* There could be no better illustration of the inefficiency of the general rules of ranking in the decisions, to meet the class of complicated transactions to which they bear reference, than the necessity which this cautious writer sometimes feels himself under of unwillingly admitting the inconsistency of the decisions with each other.

In one of the earlier cases that occurred—*ex parte* Walton, 1741, 1 Atk. 122—an onerous holder was allowed to prove his bill on both the drawer's estate and the acceptor's. This was a simple matter; but then there came a subsidiary question—the bill was for the accommodation of the drawer—had not the acceptor's estate, then, a just claim against his? The claim appeared just, and a proof was allowed. Here, however, a canon in bankruptcy law was infringed, for the same debt was twice proved on the drawer's estate—once by the holder and once by the acceptor. It was seen, too, that when more complicated transactions came to be analyzed, this system of giving bankrupt co-obligants recourse against each other's estates, while, at the same time, the estates were liable to the principal creditors, would be inexhaustible; and the same judge, Lord Hardwicke, in 1752, abandoned this practice, and gave effect to the principle, that there can be no proof by the obligants in a bill as against each other, until the holder is paid in full.—*Ex parte*, Marshal, 1 Atk. 129. It will be seen farther on, how far this principle has been extended.

It became a very puzzling matter to unite this arrangement with the adjustment of mutual acceptances and cross paper of all sorts. There might be two bankrupts, A and B, and A had doubled or tripled the assets of his estate by negotiating the paper in his hands, while B did not negotiate the paper in *his* hands. Was this to be wholly overlooked, and was there to be no adjustment between the estates? Cases of prodigious pecuniary importance connected with this question, occurred towards the end of the last century. In one of the earliest of these questions the Court of King's Bench was equally divided,—*Cowley v. Dunlop*, 18th May 1798, 7 T. R. 565. J. & A. Peters had exchanged acceptances with the Dunlops. The Peters had negotiated the acceptances of the Dunlops to the extent of £3000. The Dunlops negotiated the acceptances of the Peters to the extent of £1792—both sets of acceptances ranking against both estates. The Peters gave a large dividend: on their own acceptances it came to £1224, on the Dunlops' acceptances to £2211. Thus, while they had only incurred acceptances to the extent of £1792, their bankrupt estate paid £3435—more than they had bound themselves to pay by £1643. It seemed equitable that there should be a claim against the other estate on this sum; but according to more modern views, this would be set down as a double proof for the same debt. The matter was examined in connexion with the question, whether, this being a claim proveable under the commission, was barred by the certificate so as not to be afterwards recoverable against the bankrupt? but the bench could not come to a determination. In the same year, occurred the case of *ex parte* Walker, arising out of the Liverpool bankruptcies, in which acceptances covering about five hundred thousand pounds were standing in various positions. Lord Loughborough's solution of the difficulty was

that which Lord Eldon considered a cutting of the Gordian knot, not an untying. It was to treat, as between the two parties, all the dishonoured bills as waste paper, because they were granted for an improper purpose, and to let parties stand as if there were no such documents. It was generally admitted that the decision was a good one in this case, but its applicability as a general rule to others was much questioned. Lord Loughborough allowed a ranking for the cash balance. It was shown afterwards, that if there be cross bills out between two parties, and there be a ranking allowed for a cash balance between them, it may come to be a double ranking. A owes B £1000. A gives his acceptance to B for the amount, and B indorses it away. On both becoming bankrupt, if not only the holder of this acceptance rank for £1000, but B's estate also rank for the original debt, there is a double ranking for the same debt on A's estate. In the case of Walker, the cash balance was in favour of that estate which had given the greatest quantity of accommodation to the other. It was when this was reversed, and the one which had given the other more accommodation than it received became the debtor in the cash balance, that this effect of a double proof was perceptible.—See *ex parte* Metcalfe, 11 Vesey 404, as noticed below.

Where every case that occurs presents features so different from those of its predecessors, it naturally follows that the technical phraseology is not very precise. It is not very clear whether the term cross bills is restricted to bills specifically exchanged for each other, or extends to embrace all the paper passing between two parties who have undertaken to accommodate each other. The making a difference between these two classes of cases introduced a new element of difficulty among these complex questions. It was held, that whether they were his own acceptances, or the engagements of some other person, that one man gave to another in exchange for any such paper given by that other, the one paper was the consideration for the other—they were sold for each other. But it was found necessary to restrict the operation of this rule, so that accommodation bills exchanged were, in the general case, in the same position as those passing between the parties without exchange. If they had been admitted as the ultimate consideration for each other, then A's acceptance, found in B's repositories, for £1000, would have enabled that estate to draw a dividend on the £1000 from A's estate; while B's acceptance for the same sum, in A's repositories, would have allowed of the same operation on B's estate in favour of A's creditors. If the one estate paid a much larger dividend than the other, the effect might be considerable; and as it was found utterly inexpedient that people approaching bankruptcy should be permitted thus to juggle with the assets of their creditors, such documents, it will be afterwards seen, were allowed to neutralize each other. Again, when such paper, on the one side, had got into the hands of onerous holders, and ranked on

both estates, the holder of the counter acceptance was allowed to prove it, but only so as to be credited with a dividend which was to be paid him whenever the obligation which he had given for the one on which he thus proved, was paid, but no sooner. Thus the real consideration on either side became, not the bills themselves, but the payment which they promised. If A and B exchanged acceptances, and A indorsed B's away, but B retained A's, and both became bankrupt, B's estate could prove on A's estate for the acceptance, but only to the effect of having a dividend set apart, to be paid when B took up his own acceptances. It is clear that this could seldom produce any other effect than that of not allowing any proof whatever, as between bankrupt estates, on such paper. Professor Christian (2 B. L. 375) thinks he can trace this perplexing distinction to an incidental act of courtesy towards a nobleman. Lord Clanricarde had given certain drafts in exchange for bills. The bills were dishonoured, and Lord Clanricarde petitioned to prove them on the bankrupt estate. Lord Thurlow allowed the proof, directing the dividends to be detained till Lord Clanricarde's drafts were paid.—*Ex parte* Clanricarde, Cooke B. L. 182. The other cases in which this principle was carried out will be found cited below.

There was, for some time, an element of difference between the Scottish and the English law, which is often alluded to, and which adds to the complexity of the subject, but which rarely could affect the judgment in the cases,—this is the well-known difference as to contingent creditors, who, in England, were not allowed to rank until the 6th Geo. IV. The prospect of having to pay a debt for another person could thus not be a ground for claiming on his estate. The supposition that this should have made any difference between the method in which cross rankings were arranged in England, and that in which they were arranged in Scotland, arose from the view, that the secondary parties to a bill were sureties for the primary, and therefore stood in the position of being bound to pay in the contingency of his not paying. Such parties, it was said in England, could not prove unless they had been made liable before the bankruptcy: in Scotland, they might rank as for contingent debts.

This subject seems, however, likely to be thrown into confusion by viewing the parties whose names appear on bills as cautioners or guarantors. That they may, in their accounts with each other, be so viewed, is true; as where there are cross accommodation bills, and the one party has indorsed away the acceptances of the other, while that other has kept the former party's acceptances in his repositories, the latter, on taking up the other's acceptance, has his claim of relief as a cautioner who has satisfied the debt he guaranteed. But in questions with third parties, each name on a bill represents a primary liability, which each party holds against any one who precedes him. It is true that a party thus appearing primarily liable may not be

the just debtor in the bill. He may not calculate on having to pay it at all; or, paying it, he may have an undoubted claim of relief against a previous party. Yet notwithstanding all these circumstances, which bring the relative positions of the parties in questions with each other very close to that of surety and principal debtor, it is of essential consequence to keep in view that the party to a bill is, in reality, a principal debtor, and not a guarantor. The distinction comes out very clear in English practice, in which, as will be more particularly shown when the subject of the ranking of claims under the sequestration statute is considered, a guarantor against whom no claim under the guarantee has arisen before his bankruptcy, is not a debtor either pure or contingent—he is no debtor at all, but is only liable for a contingent obligation which may become a debt. The holder of a bill, however, has been considered as an absolute creditor, against all parties bound by it, when the bill is at maturity—as a future creditor when it is not so. Before the 7th Geo. I. c. 31, there were difficulties in the way of any parties proving whose debts were not liquid; but that act brought in the special case of future creditors on bill or note. It is true that under the clause of the English bankrupt act, (6th Geo. IV. c. 16, § 52), which enables a surety who has paid the debt to prove for it instead of the principal creditor, a party to a bill for the bankrupt's accommodation may prove in respect of his payment of it on the bankrupt estate, but that right to prove has been especially thrown on an alternative expression in the act, which admits not only any one who is “a surety,” but any one “liable for any debt of the bankrupt.” And, in *Bassett v. Dodgin and others*, 31st Jan. 1833, 9 Bing. 653, where such a proof was allowed, Tindal, C. J., said, “The defendants in this case cannot, with any propriety, be considered as *sureties* for the debt of Taylor to the plaintiff; inasmuch as they are liable primarily and immediately to the holder of the bill as indorsers, that is, as principals, and not merely upon the failure of Taylor, the principal indorser. The only question, therefore, is, whether they come within the meaning of the words ‘persons liable at the issuing of the commission for any debt of the bankrupt.’”—See *ex parte*, Lloyd, 1 Rose 4.—*Ex parte*, Yonge, 3 Ves. & Beam. 31.—Wood v. Dodgson, 2 M. & S. 195.—*Ex parte*, Porter, 4th June 1835, 4 Dea. & Ch. 774. Before the importance of the distinction between liability as cautioner, and liability as principal, in such cases, had been fully brought out, Lord Ellenborough, in a case which did not involve a question as to bankruptcy, (*Laxton v. Peat*, 1809, 2 Camp. 185,) said, “This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered a surety for the drawer.” But in the case of *Yallop v. Ebers*, 13th Jan. 1831, 1 Barn. & Adol. 698, Lord Tenterden laid down that this doctrine “has been long overruled.”

There is a form in which this class of cases has frequently presented itself in England, in which they are here scarcely

known—that of claims against the bankrupt after he has received his certificate, for debts against him which could not be proved against his estate. It is a settled principle that whenever the creditor has paid any thing for behoof of the bankrupt, for which he cannot prove against the estate, he retains his claim against the bankrupt personally; and thus, in mutual bankruptcies, there are many instances where, in the case of the one estate having to pay a dividend on a bill which was a proper debt of the other bankrupt, and where, allowing the estate which has so paid to prove against the other, would be a double proof, the claim has been brought against the bankrupt personally.

Another element of difficulty in the application of the principles brought out in the English decisions to our practice, will be found in the operation, with us, of the principle of retention, as above set forth, (p. 23,) a principle not recognized, at least in the same form or to the same extent, in the law of England.

The laying down of distinct principles on this subject being so very difficult, and the result being so liable to dubiety, it has been considered best to state only a very few, which are received as axioms in our Scottish decisions, leaving both those principles which remain unsanctioned by Scottish decisions of admitted authority, and those which have only been the subjects of decision in England, to be discussed as illustrative and commentative matter.

(42.) *Double Ranking*.—It is a general rule in bankruptcy that one debt cannot be twice ranked for, either by the original creditor or by persons holding through him, on the same estate.

This is generally admitted in all the cases, both in Scotland and England—the point of difficulty is to avoid arrangements which, without being avowedly double rankings, yet have that effect. The appearance of a double ranking may be assumed by a ranking on two separate obligations, and circumstances may occur in which it is difficult to draw the line of distinction. Such was the complicated case of *Farquharson v. Thomson*, 15th May 1832, 10 S. 526. A firm sold goods, through their agents, to another firm. The agents drew two bills on the buyers, each for the full price of the goods, and they were both accepted—the transaction being accomplished through the fraud of a member of the agent's copartnery who was in partnership also with the buyers. The one bill was indorsed to the sellers, the other was indorsed to a third party by the sellers' agents (the drawers) as *per* procuration of the sellers. The case was complicated by the efforts to recover the proceeds of both bills against the acceptors. There appears to have been no reason why the acceptors, if solvent, should not have been liable for both bills, having their recourse against the estate of the drawers, in so far as they were defrauded, or made responsible for any bill for which they got no

value. The responsibility of the acceptors, however, was, apparently through an inadvertence, allowed to be limited to once and single payment of the original debt, by an interlocutor which had become final. The application of this interlocutor was settled by reference; and the referee, considering that the holders of both bills were onerous and *bonâ fide*, ordained that the money should be divided equally between them. It thus occurred that each holder was paid half the contents of his bill, and the drawers (who were also indorsers) having been sequestrated before these payments were made, and claims having been made by both holders for the full contents of their respective bills, it came to be a question whether they could both rank in full. It was found that they could, on the principle of their being creditors in distinct debts. It would appear from this, that a decision that the acceptor of two bills is only liable for payment of the amount of the original debt, which may be equal to the contents of one of them, is not *res judicata* to prevent an indorser from being liable for both.

The Lord Ordinary (Moncreiff) considered this a case of double ranking, and observed, "Ranking, in the case of bankruptcy, is equivalent to payment where the estate is solvent, and thus the result is, that the full amount of one of the bills was paid by the acceptors, and there was a full ranking for the other against M. B. & Co., as the indorsers. To sustain this complaint, therefore, would manifestly be to allow a double ranking for the same debt, or, what is worse, a ranking for a bill against the indorser, after the acceptor has paid or consigned the full amount of it." But the principle on which, in claims against bankrupt co-obligants, a creditor may rank for his whole debt against each, appears to have been extended to this case by analogy, the restricted payment by the acceptors leaving the claim against the bankrupt indorsers in the same position as it would have been in had the former paid a dividend only.

Fall & Co.'s Trustees v. Sir W. Forbes & Co., 27th May 1790, M. 14135, was a case which would certainly now be considered a double ranking. Bankers were in the custom of advancing money to their client, and, in return, the bills payable to him were usually indorsed to the bank. Accommodation bills accepted by a third party, without value, were thus indorsed. The indorser being sequestrated, the acceptor paid the bills to the bank. In these circumstances, not only was the bank allowed to rank for the full debt without deduction of the bills thus paid, but the acceptor of the bills was allowed to rank upon them. But it would appear that this case was ruled by the clause in the act of 1783, (23d Geo. III. c. 18, § 35) which allowed a ranking in full *besides* the proceeds of whatever securities there might be on the estate, the bills being held to be securities. The effects of admitting such a system appear to have been perceived a few months later in the same year, in a case which was at first decided in favour of the creditors, but afterwards against them.

In *Stein's Creditors v. Sandeman & Graham*, 16th Nov. 1790, M. 14111, Sandeman & Graham were the consignees, in England, of Stein's goods. At the time when both parties became bankrupt, S. & G. were under acceptances to Stein to the extent of £58,000, of which the term had not arrived. They had received bills from him, of which also the term had not arrived, to the amount of £39,000, which were discounted, the proceeds being employed in paying Stein's debts, for which they had advanced a further sum of £12,000. S. & G. thought, that as the term of payment of these bills had not arrived, they might consider them as securities—as effects of their debtor in their hands—and that they might rank for their whole advances, after having got the value of these bills by discounting them to the extent of obtaining full payment. But it was found that the ranking could only be for the £12,000.

(43.) It is held in Scotland that a party to a bill may retain any debt which he is due to the party for whose accommodation the bill is granted, so as to indemnify himself for his liabilities on the bill; and that though the bill-holder be ranked in full against the party accommodated, this is not to be held a double ranking.

Christie v. Keith, 29th June 1838, 16 S. 1224.—On the parties, Cochran, on the one part, and William Kerr & Son, on the other, becoming bankrupt, there was a balance on general cash transactions in favour of Cochran, and against Kerr & Son, of £838. There was a special debt of £600, arising out of a question of succession, against Cochran, and when action was raised, the general balance was pleaded in compensation. There were then bills to the extent of £5479 in the circle, of which Kerr & Son were the drawers, and Cochran was the acceptor. They were made for Cochran's accommodation, and he had discounted them, and received the money for them. These bills were ranked on both estates. When the plea of compensation was started, as above, it was pleaded for Kerr & Co. that they had, in the first place, a right of retention, which must be given effect to before the cash balance could be set off against Cochran's special debt. This right of retention they founded on the dividends their estate had to pay on the bills, which being for Cochran's accommodation, and discounted by him, yet ranked on the estate of Kerr & Co. The court admitted the right of retention. Though there is some complexity in the case, the principle is simply this, that when there are two estates bankrupt, and a cash balance arises between them, the debtor in the cash balance—the estate against which the balance stands—is entitled to set off against it whatever dividends it may have to pay on bills for the accommodation of the other estate. This was a case where there were no cross bills—there was but one bill. It does not seem, however, that the principle of the decision

would be altered by being applied to a question of cross ranking, and saying, that where two estates have accommodated each other with acceptances, the one which has given more accommodation than it has got, may retain a cash balance for the difference. In the English case of Walker, afterwards noticed, the circumstances were so far different from this, that the estate which had the cash balance in its favour, was likewise the one which had given more accommodation than it had received. The right to prove the cash balance was undisputed—the proving the balance said to have arisen on the dishonoured bills was found incompetent. If the circumstances had been otherwise, and the estate which had the cash balance in its favour had been the one which had received more accommodation than it had given, then, if the principle of the decision in Christie's case were admitted in England, it would have been competent for the estate against which the cash balance stood to retain that balance as a set-off against the excess of the accommodations granted by it. It would thus come to pass, that a debt which could not be proved could yet be satisfied by retention. It is pretty clear, however, that the principle of this case would not be admitted in England, and that for the reasons on which it has been so often decided, that there shall be no ranking between estates on their dishonoured bills, until the holders are paid. It is held, that until the onerous holder is paid in full, the result of letting one estate rank against the other for what it may have suffered in the transaction, is just a double ranking for one debt, resulting, for the relief of a co-obligant, in a corresponding diminution of the estate on which he ranks. But if the co-obligant can plead retention, the same thing takes place. The one estate is diminished, and the other increased, by the retention; and the retention being for the same debt for which there is also a ranking, has precisely the effect of a double ranking.

The principle followed out so distinctly in England of treating the parties to bills as principals, and not as sureties, in questions with onerous holders, would serve to obviate such an anomaly. Whether it be on the estate of an acceptor, or on that of an indorser, the holder ranks for the full sum in the bill, so as to get his chance of full payment from what the estate may yield. The estate is not to be diminished, and the holder's chances of full payment affected by any one of the parties to the bill, who are responsible to him, obtaining any thing on account of that bill from the estate of a co-obligant. Now, in this case it was held, that by becoming drawers of the bill, Kerr & Son had become creditors of Cochran, and were entitled to retain whatever property of Cochran's was in their hands. It thus became virtually the result of his acceptance that the acceptor became liable to two separate debts, one to the drawers, on which they had a right of retention, the other to the onerous holder, who might rank on the estate.

It might, at first sight, appear not to affect the bill-holder's

interests whether a sum of money is found to belong to one or to another of two estates on both of which he can rank; but a moment's consideration will show that it is of some consequence to a creditor whether a thousand pounds shall form part of an estate on which he is one of a set of creditors whose whole claims amount to four thousand pounds, and which has another thousand pounds of assets to meet them with; or shall form part of another estate on which he also ranks, possessed, likewise, of another thousand pounds, but with debts to the amount of twenty thousand pounds.

(44.) *Mutual Accommodation, and one Party Bankrupt.*—When parties have accepted bills for each other's accommodation, and one of the parties becomes bankrupt, the solvent party having to pay both sets of bills, can only rank on the other party for the acceptances of that party, and cannot rank for the bills accepted by himself for the other party's accommodation.

Newbigging v. Heywood, Collins, & Co., 12th Nov. 1823, 2 S. 481.—The plea of the solvent claimants was, that the bills were the considerations for each other, each being intended as a means by which either of the parties, if he had to pay both, might operate payment against the other. It is stated in the report that "The several bills, however, composing the two sets, did not correspond with each other, in date, sum, or period, and had not been directly exchanged for each other." But it may be doubted whether the decision should have been different if the bills had been counterparts of each other.

(45.) *Several Obligants, and all Bankrupt.*—Where there are obligants each jointly liable for the whole debt, and all are bankrupt, the creditor may rank on each estate to the full extent of his debt, to the effect of drawing from the whole of them the full debt and no more; but the one bankrupt estate has not, in such circumstances, a right to rank upon any of the others for what it may have paid, for this would be, in effect, a double ranking for one debt.

The principle on which this species of ranking proceeds is, that in the case of joint and several obligations, each individual obligant is liable to the creditor for the whole sum. Whatever obligations for relief may arise between the parties, the creditor has no concern with, and is not bound to acknowledge. The certainty established by a general bankruptcy among the obligants, that none of them will be able to pay in full, has been, by usage, admitted to sanction a ranking on the estate of all. The

practice has arisen out of an equitable interpretation of the consideration that the reason why a party takes co-obligants, each liable for the whole, is, because there is a risk that, with a more limited responsibility, the obligation would not be fulfilled; and the species of ranking just described is the method by which this risk is evaded. It is worthy of remark, that in the simple case of co-obligants liable to mutual recourse, if the several estates were to re-rank upon each other, the effect would ultimately be, to bring them into the same position in which they are, the claims of those estates which paid the larger dividend being met by the payment of the smaller, which would be precisely compensated by the claims of those which paid the smaller dividend being satisfied by the corresponding larger one. As an example, suppose that of two jointly liable estates A pays 10s. per pound, and B. 5s. If A, after having paid its dividend, rank on that dividend (or a portion of it) against B, at the rate of 10s. per pound, it draws 2s. 6d. If B claim on its payment of 5s. on the estate of A, it gets, at the rate of 10s. per pound, the same sum—2s. 6d. Suppose that A pays 15s. per pound, and B 7s. per pound, A, ranking on B for 15s., gets 5s. 3d., and, in the same manner, B, ranking on A for 7s., gets 5s. 3d.

Principles of Ranking in Full against several Co-obligants.

The principle of this species of ranking does not, however, appear to have been fully investigated, for, if it were, some other points of analogy between the fulfilment of the obligation through payment of dividends, and its fulfilment through payment in full, would have been more completely explained. When a co-obligant pays in full, or pays more than his share, he has relief against his fellows, and this relief should also be possessed by a bankrupt estate paying more than what would have been its share, had it been solvent. If of two jointly liable estates one pays 15s. in the pound, and the other 5s., the former should be entitled to rank on the latter for the 5s. by way of relief. When there are several estates liable, and the bankrupt, having ranked on a certain number of them, and drawn his full debt, forbears to rank on the others, it would seem just that, on the same principle, the estates which have paid should have a right of relief against those which have not paid. The following would appear to be the just method of estimating the responsibilities of the several estates in such a case. Let the full amount of the debt be ranked on the remainder of the bankrupt estates. The result will, of course, be a surplus. If, from each of the dividends there be deducted a sum bearing the same proportion to the dividend that the surplus bears to the aggregate of the dividends, the surplus would be worked off, and the proper proportion which each estate ought to pay would be indicated. That, in the case of mutual accommodation bills by bankrupts, which have come into the hands of third parties, who rank on both estates, there may be a ranking by the one estate

on the other, if there be a surplus after payment of the holders, is admitted by Lord Eldon in *ex parte Rawson*, 1 Jac. 274.

In Scotland, it is held, that any payment before the sequestration of a co-obligant, must be deducted from the debt, the ranking being only for the remainder. Thus, if so much of the debt has been drawn in dividends from the estate of one co-obligant, and another is afterwards sequestrated, the claim against his estate will be for the debt, deducting such dividends.—*Hamilton v. Cuthbertson*, 6th Feb. 1841, 3 S. 494. It is not, however, very clearly settled, in our practice, how this principle will operate in bankruptcies nearly contemporaneous. If a dividend be declared on the estate of one co-obligant without being paid when the other is sequestrated, will it fall to be deducted? If one dividend only has been paid, and others are expected at the time of claiming, will the whole that is paid or declared on the earlier bankrupt estate at the time of the payment of the dividend on the posterior, be deducted? In England, this matter has been placed in a clearer position. Wherever a dividend has been paid, or has been declared on the estate of one co-obligant, the creditor cannot prove or claim on the other, unless he deduct the dividend, without reference to the one bankruptcy being prior or posterior to the other. The rule is, that he is entitled to a dividend on the whole debt which he *proves* under each commission, but that, if part of a debt be paid, he cannot prove for more than the remainder. *Ex parte Ryswicke*.—2 P. Williams, 89.—*Ex parte Lefebvre*, ib. 407.—*Cooper v. Pepys*, 1 Atk. 106.—*Ex parte The Royal Bank of Scotland*, 2 Rose, 197. In England, there are certain meetings at which a creditor is said to “prove” his debts, (6th G. IV. c. 16, § 46,) or at which he produces his claim and vouchers. To entitle a creditor, then, to claim on the estates of two joint obligants for the whole debt, the proof on both must take place before the declaration of a dividend on either. The case of the Royal Bank affords a stringent illustration of the rule. The Bank obtained from Stein & Co. acceptances of Kensington & Co. to the amount of £58,000. Kensington & Co. becoming bankrupt, (22d June 1812,) the Royal Bank proved on their estate to the extent of £40,000. Stein & Co. became bankrupt on 11th August 1812. At a meeting under the latter bankruptcy, on 9th January, at which debts might have been proved by the lodging of claims and affidavits, these creditors, not being prepared with their affidavit, lodged a mere claim, which did not admit of proof. On 6th February, they made their affidavit, and transmitted it to be laid before the next meeting for proving. That meeting was held on 27th March; but, in the meantime, on 13th February, a dividend of 6s. per pound was declared on Kensington & Co.’s estate. It was found that the ranking on the estate of Stein & Co. could only be for the balance. From the case of Gibson & Johnson, as referred to by Lord Eldon in that of the Royal Bank, it appears that if a claim be made in proper form, and rejected, and it be afterwards admitted on appeal to the

proper judicatory, the creditor is in the same position as if his claim had been admitted from the beginning; and a dividend obtained from another estate between the rejection and the reponing will not affect his right.

See farther on this subject Bayley on Bills, 442, *et seq.*; Cooke's Bankrupt Laws, 173, *et seq.* A curious case of ranking in full, which occurred in England, may be noticed in connexion with this subject:—Parties having sold goods, retaining them as a security for the price, and obtaining, at the same time, from the purchaser a third party's acceptance for the amount; on the purchaser and the acceptor both becoming bankrupt, it was found that the seller agreeing to take the goods at their then market value, and proving on the purchaser's estate for the difference between that sum and the price agreed on at the sale, was found likewise entitled to rank on the acceptances of the third party to the extent of drawing full payment. *Ex parte*, Fairlie, 2d May 1833, 3 Dea & Ch. 285.

(46.) *How far dividend equivalent to payment.*—A dividend is in all questions between bankrupt estates to be held as a discharge of a debt, in so far as the estate is bound for it; and thus, in estimating the mutual responsibilities of bankrupt estates to each other, the circumstance that the one pays a larger or smaller dividend than the other cannot affect the amount of the balance between them. But the receipt of a dividend is not held full payment as against the creditor, who is free to employ whatever means present themselves for obtaining payment of his debt from co-obligants or in other quarters.

This principle will be found illustrated in the greater proportion of the cases quoted in this section. In the old case of *Nairne v. Cranstoun*, 13th May 1796, M. 2597, it was laid down as a guiding principle, that "equality between the parties" should be preserved as much as possible, but this principle was abandoned in later cases. See *Newbigging's case*, p. 36. The principle on which a dividend is held equivalent to full payment will be found discussed at length in connexion with those cases where attempts were made to get indemnity for the balance of the accommodations on the one side over those on the other. See, however, considerations as to an equitable adjustment where the dividend exceeds the debtor's share of the obligation, p. 37.

(47.) *Bills ranking on several estates. Question if the estates have counter-claims on each other.*—When there are bills or notes which have passed between two sets of parties, and they become both bankrupt, such of the bills or notes as are in the hands of *bonâ fide* holders for value

rank on both estates, the right of the holders not being affected by any questions between the estates arising out of the one having obtained more accommodation than the other.

Nairne v. Cranstoun, 13th May 1796, M. 2597.—*Newbigging v. Heywood Collins & Co.* above, p. 36.—The right to rank in full against each obligant, has been amply considered above, (p. 37.) But another question arises out of such a state of matters as that set forth in the above paragraph, viz. how far the estates, after having been so ranked on, have indemnity against each other? On this subject, while little has been decided in Scotland, England has afforded many very complicated cases, which still are far from a settlement of the question. In the case of *Nairn*, which is generally repudiated, it was held, that the one party to the bills might rank on the other estate for any of the paper that happened to remain in his own possession. In the intricate case of *ex parte Walker*, 1798, 4 Ves. 372, and *Cooke's B. L.* 184, the main question at issue was, whether, in the case of two parties discounting each other's acceptances, and the holders consequently proving or ranking on both estates, there could be any proof by the one estate against the other in respect of its having incurred larger responsibilities by accommodations to that estate, than that other estate had incurred in return. Of the two parties bankrupt in this case, *Caldwell & Co.* and the house of *Browne*, the former were bankers, and the latter general merchants. They had a cash account and a bill account, the good bills as well as the cash payments being included in the former. The balance of this cash account was against the estate of *Browne*, and in favour of *Caldwell & Co.* to the extent of £40,716. If there had been no other transactions between them but those on the cash account, this was the sum on which the estate of *Browne* was entitled to prove against that of *Caldwell & Co.* The bill account presented the mutual acceptances of the parties for each other, dishonoured by their respective bankruptcies. Of these the bills accepted by the *Brownes*, and handed over to *Caldwell & Co.* amounted to £305,149, 19s. 10d., while those accepted by *Caldwell & Co.* and handed over to the *Brownes*, amounted to £204,910, 5s. This difference of more than a hundred thousand pounds between the extent to which the two estates appeared to have accommodated each other, arose from a greater proportion of *Caldwell's* acceptances falling due and being paid before the bankruptcy than was the case in regard to the *Brownes*. But although the acceptances of the *Brownes* at the time of the bankruptcy, exceeded those of *Caldwell & Co.* there were more of *Caldwell & Co.'s* acceptances in the hands of third parties than of the *Brownes*. Of the £204,910, 5s. bills received from *Caldwell & Co.* the *Brownes* had got discounted £196,589, 6s. 4d., while, of the £305,149, 19s. 10d. bills which *Caldwell & Co.* had received from the *Brownes*, they had got

discounted £126,855, 11s. 10d. There was, of course, no doubt that those who held these discounted bills might rank for them on both estates to the extent of drawing full payment. It thus happened that the extent to which the estate of Caldwell & Co. was liable for the acceptances of the Brownes exceeded the extent to which that of the Brownes was liable for the acceptances of Caldwell & Co. by £69,733, 14s. 6d. There was much complexity in the form in which the claim was made and argued, but it resolved itself into a claim by the estate of Caldwell & Co., to prove against that of the Brownes, to the extent to which it was injured by the Brownes having negotiated away more of Caldwell & Co.'s acceptances than Caldwell & Co. had done of the Brownes. The bills of the Brownes which Caldwell & Co. had received, amounting to £305,149, 19s. 10d., and the proportion of these which they had got discounted, amounting to only £126,855, 11s. 10d., they had in their hands undiscounted bills accepted by the Brownes to the extent of £178,294, 8s. They maintained, then, that besides their cash balance, as above, they might prove on these bills for the purpose of covering their damage. But they were allowed to prove only their cash balance, and thus a principle was created to the effect that where there are counter acceptances there can be no proof by the one estate against the other until all the creditors who have claims against both are satisfied, or, as the Lord Chancellor expressed it, "Till Caldwell & Co. pay all the creditors of Browne who are likewise creditors of theirs 20s. in the pound, they would be, by proving, sharing with the creditors of Browne, who are likewise creditors of theirs." By another way of stating the principle, in taking an account between parties both bankrupt, of their responsibilities to each other, dishonoured bills are not to be taken into account. In the subsequent case of *ex parte Erle*, 1801, 5 Ves. 832, where a like decision was given, the Lord Chancellor observed, that there were but two views he could take, "either to consider all the bills as struck out of the case entirely," or "to consider them all as good bills." "I do not see," he said, "that there is a middle course."

In *ex parte Rawson*, 1st Sept. 1821, Jacob 274, Lord Eldon's decision was, in effect, the same, throwing out the dishonoured bills, but a principle was introduced restrictive of the generality of this rule. Lord Eldon, in reference to the decision in *ex parte Walker*, after saying, as above stated, (p. 27,) that he did not understand it, continued, "The decision was this, that where there are cross bills drawn for accommodation, they are all to be thrown out of the account on both sides, and it is to be taken as if it were a cash account only. If this were upon the principle that applies to one or two bills, that they are not to be proved by one estate against the other, till all the creditors of both are paid, I could understand it. If there be £1000 of acceptances on the one side, and £10,000 on the other, Lord Loughborough says, that they are not to be regarded at all, that it is all chance

how the two estates may pay. I say not; and, if there be a surplus of one estate to satisfy the other, why should it not be applied? * * * I am disposed to think the commissioners right in rejecting the bills, supposing that the creditors proving under them have not been paid, which is not very likely." *

It would be very difficult to construct a rule for ranking on such a surplus. What his lordship seems to have meant is, that when there are cross acceptances which the holders prove on both estates, there is no accounting to be taken between the two estates as to the debts which the bills have represented, until it be shown that there is somewhere a surplus after the bills have been paid in full. If the one estate pays 10s. in the pound, and the other pays 12s., there will be such a surplus. It cannot be meant that the estate which exhibits the surplus is the one upon which the other will necessarily rank, because that circumstance will be a mere incidental result of precedence in declaring a dividend. On the estate of A a dividend of 12s. is declared. Thereafter, on the estate of B, there is a dividend declared of 10s. But the bill-holders cannot take more than 8s. of it, because they would be recovering more than the full debt. The 2s. of surplus is neither to be arbitrarily kept by the estate of B, nor drawn back by that of A, but it is to be the subject of an accounting between the parties. Had there been such a surplus in the above case of Walker, it is clear that the house of Caldwell & Co. would have exhibited the preferable right to it. Such an arrangement seems not inconsistent with the two leading principles that the parties who appear upon a bill are absolutely liable for its contents to third parties, but that in questions between the parties to the bill, that estate which has discounted and got value for an accommodation bill is the debtor of the other. The debt is held in abeyance so long as the holders of the bills are unpaid, but when they are paid an accounting between the parties commences.

The principle of refusing a proof against each other to the holders of accommodation bills, as derived from the above cases of Walker & Rawson, was acknowledged in the Court of Bankruptcy in *ex parte* Solarte, 20th June 1832, 2 Dea & Ch. 261. Knowles & Son drew on Dyer & Swayne, and gave the drafts to Alzedo, receiving, in exchange, his drafts. These latter had been indorsed, but the former were in the possession of Alzedo when these parties became bankrupt. Alzedo's acceptances drew a dividend on his estate, and likewise on that of Knowles & Son; and when an attempt was made to prove their drafts on Knowles & Son it was said their estate had already been subjected to proof for the same debt, by paying a dividend on the acceptances of Knowles that had been given in exchange for them. It was admitted, however, that "if Alzedo had negotiated them there is no doubt but that the holder might have proved them if

* Meaning—It is very likely that they have not.

he had given a good consideration for them." In this case, however, either the subject had not been fully considered, or the report is not very accurate, as it is not easy to reconcile it with the principle that exchanged accommodation bills are a good consideration for each other, (See below, p. 44.) See the report criticised in a case arising out of the same set of transactions, *ex parte Solarte*, 1834, 4 Dea & Ch. 419.

(48.) *Ranking for Cash Balance*.—It will have been seen that in the case of *ex parte Walker* and others, though no proof was allowed between the estates for the dishonoured bills, proof was allowed for the cash balance. It has been maintained that this effectuates a double proof. It is said that when the debtor on the cash balance accepts bills, he gives an acknowledgment of the balance to the extent to which they cover it, and that allowing the creditor in the cash balance to prove while the holders of the bills also prove, is allowing a double proof for the same debt. In the case of *Walker* the cash balance was in favour of the estate which had given more accommodation than it had received; and it was, perhaps, when instances occurred in which the reverse was the case, and the cash balance was against the estate having the bill balance in its favour that the incidence of a double ranking was perceived. The principle seems to have ruled, however, in *ex parte Read*, 5th Aug. 1822, 1 Glyn & J. 224. *Read* gave his acceptances to *Lynn* to the extent of £6444 and a guarantee to the extent of £773. *Lynn* gave *Read* a note for £1603 (covering a particular debt) and three bills for £1000 each. The paper was negotiated on both sides. *Lynn* was due *Read* a cash balance of £3576, including the £1603 for which the note was granted. On *Lynn's* bankruptcy nearly all the joint paper was proved on his estate. *Read* compounded with his creditors. In the accounting between the estates *Read* prayed that either the dishonoured bills should be struck out of the account and the cash balance alone be considered, as in *ex parte Walker*, or that he might prove his cash balance, the dividends being retained to meet the difference between what may be paid by the bankrupt's estate on the paper for which it was properly liable, and the dividend paid by the other estate on what it was properly liable for. But it was held, that to allow a proof for a cash balance after the bills representing it had been allowed to be proved, was allowing a double proof.

In Scotland there was a case very closely corresponding to this, viz. *Gibb v. Brock*, 12th May 1838, 16 S. 1002.—*Gibb* had accommodated *Buchanan & Young* to the extent of £6886: *Buchanan & Young* had accommodated *Gibb* to the extent of £2800. Both sets of accommodations had been indorsed for value. Besides the excess of his accommodations over those of the other party, *Gibb* was their creditor on a balance of cash transactions to the extent of £1580. It is not clear, however, whether this is a pure case of cross ranking; for it was pleaded that *Gibb's*

extrajudicial settlement kept him in the position of a solvent claimant, and the plea seems to have affected the decision. It does not appear that his making an extrajudicial arrangement was taken into view in the case of Read. In the Scottish case, "The court accordingly held, that Gibb was entitled to be ranked contingently, and found that a sum effeiring to the claim of the petitioner Gibb, should he set aside till he shall relieve the estates of Buchanan & Young of their claims against him."

The case of Metcalfe bears some reference to this subject; it was not a case of cross bills, but of bills for which both the estates were liable, and of a cash balance. Williamson owed Palmer £498. He delivered to him drafts to the amount of £1098. The drafts were not accepted, but they were negotiated by Palmer, thus rendering Williamson and Palmer liable as drawer and indorser. The *bona fide* holders proved under both commissions, and thus paying a dividend on £1098, Williamson's estate paid £200 more than it would have paid on the debt of £498. Palmer's assignees applied to prove the £498, but Williamson's assignees resisted, and pleaded that they ought to be reimbursed the £200 they had paid for the estate of Palmer. Lord Chancellor Eldon allowed the £498 to be proved against Williamson's estate, the dividend to be retained to exonerate so far as it would go the payments by Williamson's estate on the bills which should have been taken up by Palmer,—*ex parte*, Metcalfe, 11 Ves. 404. Professor Christian thinks the right way of viewing this case was to consider the bills to the extent of £498 as an extinction of the debt, and an onerous transfer, Palmer having obtained his money by discounting them; and then to consider the bills to the extent of £600 as for Palmer's accommodation (II. 393), but this view would not have altered the incidence of the decision in the particular circumstances, so far as related to the bankrupt estates, because there could be no proof by one upon the other.

(49.) *Exchanged Acceptances*.—Acceptances, notes, or other descriptions of negotiable paper, may be exchanged. In case of the bankruptcy of the parties, *bona fide* onerous holders will rank on all the estates whose names appear as obligants on such paper. In England it is held that each bankrupt estate may prove against the other on such paper, but only to have a dividend set apart to be paid when that other is relieved of any liabilities it may be under for the paper it received in return for that which it gave. No rule on this subject has been clearly established in Scotland.

In *Nairne v. Cranstoun*, 13th May 1796, M. 2597, it seemed to be held that the holders of interchanged paper might rank absolutely on each other in Scotland, but this was afterwards questioned—*Newbigging v. Heywood, &c.* 12th Nov. 1823, 2 S. 481—and there are no late decisions on the subject. It is held in England

that bills or notes of any kind being exchanged for each other are a valid mutual sale, so that in the case of the parties becoming bankrupt, each party may prove upon the paper in his hands. Thus if A and B exchange acceptances, not in consideration of debts arising out of separate transactions, but each acceptance in consideration of the other, each may prove against the other's estate. This, which would seem at variance with the principle that no cross acceptors can rank on each other to the prejudice of onerous holders of their paper, is accommodated to that principle by the party who proves on an acceptance not drawing a dividend until he has actually paid the promised price for it—that is, until the acceptance he gave for it has been paid. The rule holds whether a party give his own acceptance or some other person's. One of the latest cases in which it is illustrated is that of *ex parte* Solarte, 11th Jan. 1834, 3 Dea. & Ch. 419, 1 Mon. & Ay. 270. Dyer & Swayne had accepted for Knowles & Son, and Knowles & Son had accepted for Dyer & Swayne. Alzedo accepted the drafts of Knowles & Son, and in exchange for such acceptances received the acceptances by Dyer & Swayne of drafts by Knowles & Son. The parties became bankrupt before the bills fell due, and the order was that “the assignees of Alzedo be admitted to prove upon all Dyer & Swayne's acceptances in their hands, retaining the dividends for further directions, when it shall be ascertained what each estate (including that of Knowles & Co.) shall have paid in the whole of their liabilities.” Mr Justice Merivale in pronouncing the order made the following distinction:—“As to the two first sets of acceptances, namely those which passed between the houses of Knowles & Son, and Dyer & Swayne, it is abundantly clear, from the course of dealing between the two houses, that they were in the nature of mere reciprocal acceptances, given to the two houses for each other's accommodation, without specific exchange: and therefore, according to the principle established so long ago as the time of Lord Roslyn in *ex parte* Walker, and ever since followed, not constituting a debt proveable on either side under the bankruptcy. But, although mere accommodation bills, and as such not proveable on their respective estates, it is equally clear, upon the principles no less firmly established, and every day acted upon, that in the hands of *bonâ fide* holders for valuable consideration, and whether with or without notice of the nature of the dealings between the two houses, they constitute such a debt as would be held proveable against both estates under the respective commissions.” But with respect to the bills specifically exchanged for Alzedo's acceptance, it was observed, “Now, it is a principle quite as clearly established as either of those already noticed, that if a bill of exchange be given expressly in consideration of another bill, and in exchange for it, which is the case as to the present transaction, the consideration is valid; and the holder may prove under a commission against the party by whom the bill was given.” See on this subject Rolfe v. Caslon, 2 H. Blackst. 570; Cowley v. Dunlop, 7 T. R. 565; Buckler v. But-

tivant, 3 East, 72; *ex parte* Hustler, Glyn and Ja. 9; *ex parte* Beaufoy, Cooke's B. L. 158; *ex parte* Maydwell, ib. 157.

Mutual Ranking on Bills transferred through third parties.

(50.) When there are simple cross accommodations between two bankrupt estates, when A accepts B's drafts and B accepts A's, it may be difficult to fix the best rule for ranking, but it is not difficult to apply a rule when it is fixed. Thus, the rule that in such a case neither of the two estates is to rank upon the other on these bills until the onerous holders are paid, cannot be in the general case one of difficult application. But when the transactions are of a mixed character, and various kinds of accommodation paper with the names of a variety of third parties are transferred from party to party, the same simple rule is not applicable. Suppose for instance that A gets B's acceptance for his accommodation, and afterwards gives C's, and then in his transactions with C, indorses B's to him, and all parties become bankrupt, it cannot be a reason why the estate of C, which has onerously obtained B's acceptance, should not rank on it, that B has also obtained in the course of his transactions the acceptance of C. It is said that you must not rank upon accommodation acceptances while there are onerous holders ranking on you and the acceptor, and not paid in full; and where it lies between the two original parties to the accommodation transactions the rule may be easily applied, but it would be inconsistent with the principle on which this practice has been founded to apply it in any way to those who have obtained the acceptances as onerous third parties. Out of the principle that mutual accommodation drawers and acceptors cannot rank on each other while the claimants against both are unsatisfied, such an apparent anomaly as the following may occur. A accommodates B with his acceptance for £1000, and B indorses it away. B gives A a similar accommodation, but it is not indorsed away. The holder of the former bill ranks against both estates, but the latter bill cannot draw a dividend from B's estate unless A's acceptance is paid by A in full. On the other hand, however, if this acceptance of B had been indorsed away like A's, it too would have ranked on both estates. This illustration is adduced as evincing how different the claims of accommodation paper to rank on its granter's estate becomes after it has passed out of the hands of the parties to the original accommodation, from what it is while in their hands. As above observed, it is not easy to elicit rules of ranking applicable to these complex transactions; but it would seem that it may be held that where parties hold each other's obligations, not directly obtained from each other, but obtained through transactions with third parties, the rule against parties ranking on each other's acceptances while there are onerous creditors on them unpaid, does not hold. Perhaps it was in such a view that the House of Lords reversed the

decision of the Court of Session in *Curtis v. Chippendale*, 9th Dec. 1794, M. 2589. The circumstances are thus stated in the report.

"William M'Alpine & Co., Livesay, Hargrave & Co., and Lewis & Potter agreed, that an exchange of bills should take place among them, with a view to support each other's credit.

"Bills accordingly were delivered to Livesay, Hargrave & Co., and Lewis & Potter, by M'Alpine & Co., to a very large amount, drawn by them, and accepted, partly by other houses with whom they were connected, and partly by Barr & Maddox, a fictitious firm assumed by themselves.

"Many of the bills thus obtained, were indorsed by Livesay & Co., and Lewis & Co., to their bankers Gibson & Johnson, in security of advances which they had made for them.

"On the other hand, M'Alpine & Co. received bills to a large amount from Livesay & Co. and Lewis & Potter, which were drawn by them, chiefly on their own agents, and accepted by Gibson & Johnson.

"In May 1788, M'Alpine & Co., Livesay, Hargrave & Co., Lewis & Potter, and Gibson & Johnson, became bankrupt.

"Bills accepted, drawn, or indorsed, by M'Alpine & Co. to the extent of £25,801, 4s. 10d., were then in the hands of Gibson & Johnson.

"The assignees under the commission of bankruptcy awarded against them, entered a claim for this sum, upon the sequestrated estate of M'Alpine & Co.

"The trustee *objected* to the claim, that bills accepted by Gibson & Johnson, to the amount of £22,513, 14s. 5d., had been put into the hands of M'Alpine & Co., which they had indorsed, and which not having been retired by the acceptors, were now ranked on the estate of M'Alpine & Co., and that therefore their amount fell to be deducted from the claim of Gibson & Johnson, who could only rank for the balance, being £3287, 10s. 5d.

"It appeared, that the holders of the bills accepted by Gibson & Johnson, had likewise claimed on their estate, and had drawn a dividend of 5s. 8d. in the pound. The estate of M'Alpine & Co. had at this time paid nothing, but it was stated as pretty clear, that it would afford their creditors a dividend of 2s. 6d. in the pound."

It has been observed that, though not mentioned in the reports of the decision, in reality M'Alpine & Co. were onerous holders of the acceptances of Gibson & Johnson, because besides the accommodation bills which they had given they had also given good bills nearly to the same amount as those they received. (Glen on Bills, 369, Th. on B. 770.) It has been argued that this onerosity gave a right, only assailable through some specialty, to M'Alpine & Co. to claim indemnity for whatever sums they had to pay as indorsers on the bills given them by the English houses, and that the demand made against them to pay their own accep-

tances, gave them an opportunity of operating this indemnity by retention. Had the claimants upon them been the English houses to which they had granted their acceptances, they would have operated their indemnity by retaining a dividend on these acceptances till the party claiming the dividend had made good the consideration given for the acceptances by taking up the paper given in exchange for them if there was an exchange, or, if these were mere cross bills by the throwing the dishonoured ones out of the account, as in the case of Walker. But the bills were in the hands of onerous holders, and the question was whether an estate could plead a right of indemnity against onerous holders, on the ground that it was liable as indorser for certain acceptances of that onerous holder. The Court of Session found in the affirmative, and "that a person may plead retention till the creditor claiming a debt of any sort from him relieve him of all obligations for which that creditor is primarily liable." This was reversed by the House of Lords, but the reasons of reversal are not reported. An effort has been made to show that the decision rested on the following specialty. At the time of the decision a contingent creditor, such as an indorser of a bill who may be made liable for it, had no claim under the English bankrupt law, and there was a clause in the then Scottish act (23 G. III. c. 18, § 22,) which it was inferred involved a like principle. But if the decision of the House of Lords rested on the principles that regulated the English decisions, which is very probable, the exclusion of a virtual double ranking would be the regulating principle. If Gibson & Johnson paid a dividend on their acceptances, and if their estate likewise lost through the operation of retention a sum which M'Alpine & Co. paid as indorsers of the same bills, it was as much a double ranking, as if M'Alpine & Co. after paying a dividend as indorsers had drawn it back by ranking on the estate of the acceptors.

For fully understanding how the very same operation which in cases so apparently similar may turn out to be in the one a double ranking, and in the other the means of avoiding that anomaly, it is necessary again to keep in view the complete change which takes place in the character of accommodation paper after it leaves the hands of the original parties, and is in those of onerous third parties. In the former case it is merely an instrument of relief by which the holder may get himself protected against his own liabilities. In the latter case it is an unqualified obligation absolute against the acceptor and against the indorser. When, of cross accommodation bills, those given to the one party are paid away for value, while those given to the other are not, then if both parties become bankrupt, it will be equivalent to a double ranking if the unindorsed acceptance rank on its acceptor's estate, because that estate has already been ranked on for the original debt as an indorser,—and hence the decision in *Nairne v. Cranstoun*, 13th May 1796, M. 2597, is doubted. But it is far otherwise if this acceptance like the other has been indorsed. Then the acceptor's estate is not only

liable for this acceptance, but also, as indorser, for the counter acceptance. While only one of the documents is indorsed away, there is only one debt constituted for which both the estates are liable. When they are both indorsed away, there are two debts, for each of which both the estates are liable. It thus happens that any attempt to disturb this arrangement by indemnifying a party who is liable as an indorser, against the acceptor, may, as above, produce the effect of a double ranking on the acceptor's estate.

(51.) *Deposited Bills*.—If a creditor holding in deposit separate bills by third parties, covering separate parts of a debt, should fail to recover from the several obligants on these bills the whole of his debt, he may rank for the whole amount on the estate of the principal obligant, to the effect of drawing the balance unpaid in dividends.

Black v. Melrose, 29th February 1840, 2 D. 706.—The bankrupts had applied to a friend for his acceptance to the extent of £800, and he gave it on receiving from them, indorsed in security, four bills by third parties covering £200 each. The parties had to pay these bills; but one of them being bankrupt a dividend only was obtained from him to the extent of £41. £641 of the original debt had thus been paid, £159 remaining unpaid. The question was, whether the creditor could still rank for the whole £800 to the extent of drawing payment of his £159; or could only rank for £200, the amount of the bill on which he had obtained a composition, the parties who had paid the other three bills ranking respectively for £200 each. It was decided, that the creditor was entitled to rank for the full debt on which he held the bills as securities. The case was kept distinct from that of a discounteer of a bill, who buys the document and makes what he can of it. The bills, it was held, did not, in this case, supersede the original debt: the creditor was still a creditor on that debt, entitled, while he ranked for it in full, to realise as much of it as he could through the instrumentality of the bills. The case illustrates the principle that the obligor in a bill, however he may stand in regard to the bankrupt, has not, in relation to third parties, any of the privileges of a cautioner. So far as respects them he is bound absolutely. The cautioner for a debt acquires right to it on paying it, and it is then he, and not the original creditor, who can rank for its amount on the bankrupt estate. The party to a bill acquires the bill on paying it, but he does not acquire the debt if it be separate from the bill. He has a claim as for money paid to the bankrupt's creditor, but he cannot come into competition with that creditor, or have any recourse against the bankrupt estate until after the creditor is satisfied. The remarks of Lord Medwyn, by whose opinion the court was guided, amply illustrate the

principle. He said, (2 D. 715) "The case is different if a bill is discounted and the acceptor becomes bankrupt, and it is ranked on his sequestrated estate. There is no separate security there, but another obligant is bound on the bill, and bound for the whole debt, but for no other debt. When the dividend is drawn from the bankrupt estate the surplus must be paid by the co-obligant. Therefore, if he steps forward and pays the bill, he is entitled to step into the right of the holder to rank, and by an assignation does so, and when he draws the dividend he and the cedent are just in the same situation as if the cedent had ranked.

"But it is different in the case of a bill deposited in security of a debt. There the ranking is not on the security-bills at all; it is on the debt which is secured by them, and the deposit of these is to indemnify for loss to the extent of the bill or bills, if that be necessary. The security-creditors may get the benefit of the ranking, or of a portion of it, or of more of it, just according to the circumstances of the bankruptcy. If all the four security-bills had been paid up, then Melrose & Company had no longer any right to a dividend on a debt already paid, and they would have been bound to assign their right to rank: or, if they were already ranked, they would draw the dividend and come against the security-creditors proportionally for the balance. But if the whole debt is not paid up by the failure of one to pay, the obligation of each security-creditor to pay £200, becomes operative here also; and this obligation can only be fulfilled by each solvent party paying a proportional share after receiving the dividends from the estate of the original debtor, and also of the bankrupt security-creditor. In this way the ranking for the whole debt benefits the cautioner or security-creditor. It follows from these rules that, if the surplus, after drawing the dividend, leaves a larger debt than the amount of the security-bill, this must be paid up without any benefit from the ranking."

In a case in England, where the circumstances were very different, a like principle of making the parties responsible on the faces of bills absolutely liable for them, without such recourse as could reduce the fund for the payment of the bankrupt's creditors, ruled the decision. Two parties having granted a joint and several promissory note "for value received," which was, in reality, a security for an advance to a third party, the third party and one of the acceptors having become bankrupt, the other acceptor paying the bill was not entitled to prove the moiety of it on the estate of the co-acceptor. The claim was laid on the 6th Geo. IV. c. 16, § 52, as payment of a debt of the bankrupt for which the co-acceptor was liable, but it was held that the co-acceptor had merely paid his own debt.—*Ex parte* Porter, 4th June 1835, 4 Dea & Ch. 774. See farther on the subject, p. 52, *et seq.*

In *ex parte* Britten, 21st Feb. 1833, 3 Dea & Ch. 35, a bill deposited but not indorsed was held to be a security only, and not proveable when the advances for which it was pledged were paid.

CHAPTER III.

PREFERENCES BY SECURITY AND DILIGENCE.

THERE are two means by which a preference may be created over a debtor's property—the special agreement of parties, as in the case of a pledge, and the operation of law in relation to the position in which parties have placed themselves, as in the case of the landlord's hypothec, or the factor's lien. The exposition of the law relating to the former class of preferences would embrace the whole circle of contracts and the constitution of property; and to admit of their classification under certain general rules of ranking would require, as an appendage to each rule, a disquisition on the nature and constitution of the particular contract out of which the preference might arise. In relation to this class of preferences, then, all that has been considered as coming within the range of the present work has been a general view of the rules by which they are governed when they come into competition with each other, and of the rights which their holders may exercise as creditors in addition to their rights as security-holders.

In those cases, however, where the law declares that a person placed in a particular relation to his debtor shall have a privilege or preference over some part of his property which creditors at large do not hold, a general rule of ranking is created, the enunciation of which appears to come properly within the scope of the bankrupt law, as forming a set of general canons by which, independently of special contract, the distribution of a debtor's funds is to be regulated. In this view the operation of the tacit securities, lien, and hypothec—which, though they doubtless arise out of the transactions of debtor and creditor with each other, yet are not created by special contract,—has been included. As the completion of certain steps of diligence also creates a preference, which, in the same manner, comes into existence without special contract, the character of the preferences so created has been thought to come legitimately under the head of general ranking. In the exposition of this branch of the subject, however, the practical law of diligence—the title on which it may be founded, the circumstances in which it may proceed, the ceremonies necessary to give it validity, &c. are not discussed. As in the instance of the tacit securities, the existence of the preference is presumed, and on this presumption its nature and extent are described.

SECT. 1. GENERAL RULES AS TO CREDITORS HOLDING
PREFERENCES.

(52.) *Security-holder's Claims as Creditor.*—In rankings not regulated by the sequestration statute, a creditor to whom any portion of the debtor's property, real or personal, is impignorated, or who holds it by any possessory right of security, such as lien, retains his security absolutely for what remains, though a portion of the debt be paid.

For the authorities, see par. 54.

(53.) In like rankings, a creditor who has obtained any collateral security for his debt, personal or real, retains it in the same manner absolutely for every portion of the debt.

For the authorities, see par. 54.

(54.) A creditor who has a security according to the limits of either of the two immediately preceding paragraphs, if he should fail to obtain full payment of his debt after exhausting his security, may, in a general ranking of creditors, as per par. 52, rank for the full debt without deducting the payment received through the security, provided that on the whole he draw no more than twenty shillings in the pound.

These three propositions are illustrated by the same cases. The third is the counterpart of the principle involved in the two others. It has been considered expedient to keep the first and second distinct from each other, although they are virtually the same principle,—because, where the security partakes of the character of impignoration, as pledge, bond and disposition in security, &c., the character of the security creates the species of ranking without reference to the question of its connexion with the debt; while in securities of another kind, such as a bill of exchange, or a cautionary obligation, the right of the creditor to full payment, independently of what he may obtain through the security, depends on the latter being a collateral obligation, separate from, and in aid of the original one. As an illustration,—when a moveable is held in pledge, it is clear from the very nature of the transaction that there is a debt independently of the security; but when a third party's acceptance is given, unless there be some reason for holding it as a collateral security, it is generally a security in satisfaction of the debt. The case of

a ranking in full, after a portion of the debt had been recovered through the bills of third parties given as collateral securities, is illustrated in *Black v. Melrose*, 29th Feb. 1840, 2 D. 706, already referred to (p. 49.) See also *Goodall v. Finlayson*, 21st May 1829, 7 S 628.

The principles contained in these propositions have been generally received as undoubted law by the commentators, but their origin cannot be very distinctly traced. They are not illustrated by many cases. In *Macdougall v. Macdougall*, 5th June 1801, (*M. Right in Security*, App. No. I.) a person, on paying the price of a ship bought by another, obtained a vendition of the ship and bills. The ship was sold, but the price not meeting the debt, the creditor was entitled to rank on the bills for the whole debt.

In *Boswell v. Ayrshire Banking Company*, 15th Jan. 1841, 3 D. 352, the principle was applied in a ranking and sale. In that case, as will be seen elsewhere, (p. 57,) an attempt was made to carry the principle out to the extent of giving a security-creditor, who is paid in full, an interest to rank as a general creditor, for the advantage of postponed heritable creditors, which elicited the following remarks from the Lord Ordinary, (Ivory):—"The Lord Ordinary thinks, on the whole, that *the terms* of the several judgments upon the *analogy* of which they [the postponed heritable creditors] are forced to rely, very strongly support the proposition of the personal creditors, that the ranking for the whole debts thereby allowed to heritable creditors who are but partially secured, is a secondary or *supplementary* ranking only, held in law to take place *after* the heritable security had been exhausted, and only permitted at all for the purpose of allowing them to recover (though in full) *the balance* which may *then* remain unsatisfied. This may not be distinctly expressed, perhaps, in any of these authorities, but it seems to be pretty clearly implied in them all."

In *Kirkaldy v. Middleton*, 8th Dec. 1841, 4 D. 202, a creditor in a bond and disposition in security, having obtained part payment of his debt by a sale, was, in the case of the estate being insolvent and distributed under a private trust, found entitled to rank for the full debt, to the effect of getting payment of the remainder. In this case the debtor was dead, and he had appointed, by a *mortis causâ* disposition, certain trustees to realize and distribute his estate. Although this was intended as a family settlement, the estate being insolvent, it was converted, through the instructions to the trustees sanctioned by the creditors, into a virtual trust for behoof of creditors, and was thus held "to vest the whole personal estate of the debtor in the trustees, for behoof of, and for equal distribution (according to their existing preferences) among the whole acceding creditors, and to constitute the property so vested as a fund attached and secured for their rateable payment, in the same way, and to the same effect, as if the same had been attached by separate diligence, used simultaneously at the instance of each of the said creditors."

(Lord Ordinary's Interlocutor.) In this view the trust was held to be equivalent to a second security in favour of the creditors in the bond and disposition, but it was held unnecessary to consider it in that light, and quite sufficient to justify the payment of a dividend on the full debt, that at the time of the ranking that debt existed, though the creditor was subsequently enabled to draw payment of a part of it through means of his security. The following opinion delivered by Lord Fullerton in this case is instructive :—

“It certainly seems at first sight singular that a creditor should, after getting payment of part of his debt, be allowed for any purpose to found upon it as subsisting to its full amount. When a debtor makes a creditor recover a partial payment the debt is diminished by that amount ; and if the creditor holds a security, the security is proportionally diminished, that is, it is only a security for the balance. When it is said in some of the cases referred to, that the security remains entire, though the debt is diminished, it can mean nothing more than that the totality of the *ipsum corpus* of the subject, forming the security, remains available to the creditor, though it is a security for a smaller sum. A party holding a pledge for a debt, and taking a partial payment, retains the full right of the pledge, but it remains a pledge only for the balance.

“Accordingly, if in this case, Middleton had paid part of the debt in his lifetime, or if Kirkaldy had during his lifetime, or even before the ranking and competition, sold the lands and got the price, his subsequent claims of ranking must have been limited to the balance.

“But where a competition of creditors, and a ranking of those creditors occurs, a different principle is let in. There are no means of payment to which *ex hypothesi* the funds are inadequate. For the claim of payment which existed against the debtor, there is substituted, as against the competing creditors, a claim to share the fund of division, and the proportional share of each creditor on the fund is estimated according to the amount of his debt as it stood when the ranking commenced. Accordingly, in the ordinary case of sequestration, the dividends, as paid, are not subtracted from the amount of each debt ; but, on each successive fund emerging, each creditor is rated on it according to the amount of his original debt. This leads to no difficulty when the estate is all massed together, and when all the creditors share on the same principle ; but the difficulty arises, when, by separate securities or preferences, there is a separation of one part of the estate from the mass, and certain creditors, holding these preferences or securities, are entitled to share the fund covered by these securities, to the exclusion of the great body of the creditors. Then the question arises, whether the creditors, who have taken the separate fund, shall be bound to deduct the value of the security as a payment from the amount of the debt, for which they would otherwise have ranked on the general fund ; or shall

be entitled to rank on both funds, the fund of security, and the general mass of the estate, according to their original debts? Different systems of law have adopted different principles on this point. In sequestrations, the former, which is more consistent with the equalization of the rights of creditors, has been introduced by statute, but the rule of the common law has been formed on a different principle. According to it, the creditors who have shared or appropriated one part of the property of the bankrupt, are still, in ranking on the residue, entitled to share according to the ratio of their whole original debts, always under the condition, that by so ranking, they shall not draw more than full payment. And whatever may be thought of this in equity, it involves no absolute inconsistency, there being, in such cases, as has been already observed, no question of payment to which the whole estate is confessedly inadequate, but of division. The principle just referred to does no more than allow each responsible creditor to rank and share on each of the separate funds of division, according to the ratio of his original debt, just as each creditor ranks in a sequestration for his whole debt, on each successively arriving fund of division. Nothing brings out this principle more clearly than such cases as those of the Earl of Loudon against the creditors of Gilston, and the ranking of Auchinbreck's creditors, (see below, p. 56) in which a *pari passu* adjudger, who had drawn a payment from funds not covered by the adjudication, was still found entitled, in competition with the adjudgers, to rank on the adjudged property for the full amount of the debt.

"Now it does not appear to me to be indispensable, in order to let in the operation of this principle, that there should be two or more absolutely effectual securities. That is indeed one case of the application of the principle, but there is room for it on the broader ground, whenever there is insolvency and the ranking of creditors, and where one part of the debtor's property or effects is separated by diligence or securities in favour of one or more creditors from the general mass of the effects. In every case of the kind, there are two funds of appropriation or division,—the one divisible among the creditors secured alone, and the other divisible among the general body. The ranking on each is different,—that on the first being confined to the creditor or creditors secured, that on the latter extending to the whole body of creditors, including those secured. But in both the *ratio* of the ranking, as in every ranking, is the same, viz., the amount of the original debt of each creditor."

Professor Bell, who, of our commentators, has been the chief expositor of this principle, says, in reference to the securities not narrowed by payment, "The old wadset, the modern absolute disposition and backbond, the pledge of moveables, and the lien or right of retention; all of them give an absolute security to the debtor [creditor] for the last farthing of his debt," (2 B. C. 532.) And he says farther, "The security of a common heritable bond is not of the nature of a sale under reversion. It is a mere

accessory to the debt, and is diminished as the debt decreases, by intromission or by payments," (2 B. C. 534.)

Several of the decisions illustrating the point bear particularly on adjudications. (*Loudon v. Ross*, 16th Feb. 1734, M. 14114—*Auchinbreck's Creditors, v. Lockwood*, 21st July 1758, M. 14129, 5 B. S. 363.) These establish the doctrine of Erskine in such cases that "the security is as broad for the last shilling as for the whole sum," (2 E. 12. 67.) Professor Bell thought that after the case of *Campbell v. Scotland*, 7th March 1794, M. 321, in which it was found that a general adjudication is not a sale under reversion, but a *pignus prætorium*, it did not constitute a sufficient possessory right to justify the rule, (2 B. C. 533;) but in the case of *Dalrymple's Trustees v. Cuthbertson*, 18th May 1825, 4 S. 16, its application to adjudications was confirmed.

(55.) A person who holds separate securities of the above character, on distinct estates, for the same debt, may rank on each estate for the full debt secured on it, to the effect of drawing complete payment of his debt.

Douglas, Heron & Co. v. Bank of England, 2d Aug. 1781, M. 14131, 2 B. C. 522. See, however, the limitation of the doctrine in paragraph 57.

(56.) On this principle, the holder of an heritable security for a debt, who also adjudges his debtor's estate, ranks on the adjudication in full for his debt, if the estate affected by the adjudication is distinct from that covered by the security; but if they be the same estate, he ranks on the adjudication only for the balance remaining unpaid over what he has drawn by his heritable security.

Auchinbreck's Creditors v. Lockwood, 21st July 1758, M. 14129.—*Auchinbreck's Creditors competing*, 12th July 1769, M. 14131.—*Douglas, Heron & Co. v. Bank of England*, 2d Aug. 1781, M. 14131.—*Grant v. Grant's Creditors*, 2d March 1791, M. 14139.—*Kirkaldy v. Middleton*, 8th Dec. 1841, 4 D. 202.

(57.) *Catholic and Secondary Creditor*.—Where there are security-creditors of two classes, the one having a security over the same estate over which the other is secured, and likewise having a security over another estate, the former, called a catholic creditor, cannot capriciously draw his debt from the estate on which the other creditor is secured, to the prejudice of that creditor, nor can he draw it equally from both estates, but must exhaust the estate on which there is no other security.

2 E. 12. 66. *Kemp's Trustees v. Ure*, 15th Jan. 1822, 1 S. 235. Here U. held a security for £400 over the property of W. and that of J., and K. obtained a security for £500 over J.'s property. U. threatening to sell J.'s property for his debt, K. intimated his own security, and requested that W.'s, which was unburdened, might be sold. U. disregarding the application was found liable for K.'s debt, which the estate was insufficient to meet. Erskine holds that if the catholic creditor find it material to draw payment out of one of the subjects, he is bound to assign his security over the other to the postponed creditor, whose security he has in that manner disappointed.

In *Moray v. Mansfield*, 4th June 1836, 14 S. 886, there were two estates covered by a catholic security, and one of them under postponed securities. A purchaser bought the one which had no postponed securities, and, in ignorance of the catholic creditor's burden, did not get it discharged. He paid it, and discharged it so far as it affected his own purchase, but kept it up as to the other estate. It was found that he could only rank for so much of the amount as effeired to the value of that estate.

The principles of the ranking of catholic and secondary securities will be found analysed with reference to the various cases likely to occur, in Kame's Principles of Equity, l. 124, *et seq.* and 2 B. C. 523, *et seq.*

(58.) Though a creditor hold two securities for his debt, if the one be against a party primarily liable, and the other against a party liable only subsidiarily, as a cautioner, a postponed creditor of the former cannot require him to rank on the latter.

Miller v. Baird, 24th Nov. 1749, M. 12721; *Steuart v. Maxwell*, 11th Jan. 1814, F. C., where one sum was secured on two estates, the one belonging to the debtor, and the other to his wife, and another sum was secured on the husband's estate alone. The latter was insufficient to meet both debts, yet the wife being held merely a cautioner, it was found that the debt doubly secured could not rank on her estate, as the husband's was sufficient to pay it alone.

(59.) A security-creditor who has operated full payment through his security, has no interest in the estate as a simple creditor, which he can make available to postponed heritable creditors, or which they can apply towards implementing deficiencies in their securities.

Boswell v. Ayrshire Banking Co. 15th Jan. 1841, 3 D. 352. The analogy of a catholic creditor's obligation to use his right in such a manner as to afford room for recovery by a postponed creditor, was attempted to be carried out in this case. The

primary creditors were considered as having two securities, the one their security properly so called, the other their right to adjudge for the debt; and it was held that they were not entitled to use one only of these, and thereby absorb the fund available for the postponed heritable creditors. It was found, however, that the right of ranking for the debt did not come into existence unless in the case of there being a balance not covered by the security. In *Brown v. Rae*, 14th Jan. 1835, 13 S. 256, on the same principle that the person primarily secured is under no obligation to postponed creditors beyond that of not injuring them by a capricious use of his powers, a creditor in possession under a first security was found entitled, after applying the rents to payment of interest, to hand the surplus to the proprietor, and not bound to apply it in extinction of the principal sum.

(60.) *Indefinite Payment*.—A security-creditor receiving an indefinite payment is entitled to attribute it in satisfaction of any debt which is not secured, or, among security debts, to that which is least effectually secured.

Smith v. Oswald, Nov. 1687, M. 6802.—*Semple v. Comistoun*, 13th July 1705, M. 6803.—*Bannatyne's Representatives v. Brown's Trustees*, 3 S. 593. The rule was in this case thus laid down by the Lord Ordinary:—"By the law of Scotland, where sundry debts are due by a debtor, and an indefinite payment made, the creditor, in general cases, is entitled to apply such payments in the manner most favourable to himself; but where payment has been made by the debtor and received by the creditor, on a general and mutual understanding that the same was applicable to a special account, the creditor cannot, on emerging circumstances, alter the application of such payment." The principle was applied in the complicated ranking in *Mackenzie v. Gordon*, 16th Jan. 1838, 16 S. 311. See also *Goldie v. Bank of Scotland*, 27th Feb. 1834, 12 S. 498, and *Christie v. Royal Bank*, 17th May 1839, 1 D. 745.

SECT. 2.

LIEN.

On the present occasion, lien is considered only in so far as it is a security over moveable goods in the possession of the creditor. Reasons have been already given for viewing it as a distinct principle from that of retention, (see above, p. 23,) and the subject will be found farther examined below, p. 61.

(61.) *Constitution*.—To constitute a preference by lien, the subject on which it is founded must be in the actual possession of the creditor, and at his disposal; and it

does not arise where the creditor has merely access to the subject while it is at the disposal of some other person.

Callam v. Ferrier, 20th Dec. 1822, 2 S. 102, affirmed 17th June 1825, 1 W. S. 399. Here a person who was employed to cut bark and float wood, and who hired persons to assist him, was found not to have a lien on the cut wood for arrears of remuneration. In *Burns v. Bruce*, 17th Feb. 1791, H. 29, it was found that a person who acted as clerk or agent for carriers, had no lien over their horses and wagons for disbursements and arrears of salary.

Lien, being the creature of possession, is at an end when the possession ceases, unless it be continued by special contract, or the new possession be statutorily declared a continuation of the old for the purpose of lien, as in the case of goods in the bonded warehouses, (see p. 66.) The question whether lien may revive on recovery of possession will be found examined 2 B. C. 95. When a factor disposes of the goods over which he has a lien, his security is converted into a right of retention of the price. See above, chap. II. sect. 2.

(62.) The possession must have been acquired by the consent of parties, and must not be merely accidental, or acquired through the act of the creditor without the knowledge of, or contrary to the intention of the debtor.

Louison v. Craik, 24th June 1842, 4 D. 1452.—Here a son, having the same name as his father, had guaranteed the price of goods purchased by the father. Partly (it seemed) by accident, and partly by the intervention of the son, the goods were delivered to the son. He was found not entitled to lien. In *Mackenzie v. Newall*, 2d July 1824, 3 S. 206, a partner was in the practice of leaving his trunk at his copartner's house, while paying visits to the town where the latter lived. He did so after the dissolution of the partnership, when the copartner detained it in security of a balance which he claimed. He was found not entitled to retention. In *Glendoning's creditors v. Montgomery*, 9th June 1745, Elchies, retention was allowed of goods informally pointed; but the decision has been repudiated. See *Bell's Illustrations*, 1413, and below, p. 62.

(63.) Property placed in the creditor's hands as trustee or custodier for the benefit of the debtor, or for any purpose incompatible with the creditor's holding a lien over it, cannot be held in lien.

If it is the intention of parties at the moment of delivery that the property should serve as a security for debt, the security

created is pledge, not lien. It is essential to the existence of lien that the transfer should be with the debtor's consent, but not necessary that his consent should be given with the view of creating a security. On the other hand, however, if the purpose with which he makes the transfer be one which expressly excludes his consent to the property being held as a security, the lien cannot exist. This is exemplified in Appine's creditors, competing, 10th Dec. 1760, M. 749, where the debtor absconding from his creditors in general, intrusted one of them with the keys of his house and an inventory of the furniture and books. After notour bankruptcy the debtor certified by letter that this was a delivery for the creditor's security; but it was found not to constitute an effectual lien, the custody having evidently been given in trust, and with the full understanding that on the debtor's return he was to obtain restitution of possession. The principle is well illustrated in the English case of *Burn v. Brown*, 2 Starkie, 272, where an agent who had obtained a ship's certificate that he might pay the customs' duties, was found not entitled to retain it.

(64.) *Workmen and Manufacturers.*—An artisan or other person having a commodity in his possession on which he has exercised labour or skill, has a lien on it against his employer and those deriving right from him.

3 E. 4, 21. It was found in the late case of *Somerville v. Brown*, 10th July 1844, that a printer has no lien on stereotype plates from which he is employed to throw off an impression of a book. He would have a lien on the sheets thrown off from them, but as he performs no operation on the plates themselves, but merely uses them as the instruments for producing a manufacture, he has no right to retain them.

It is not easy, nor perhaps is it always necessary, to keep this species of lien distinct from a seller's right to refuse delivery until he finds the purchaser ready to pay the price of the commodity purchased. The test of the proper application of lien is, however, where the property is in one person and the possession in another. In the case of an article purchased and undelivered, the property and the possession are in the same person—the seller, and his right is not properly a lien. On the other hand, when a carpenter fits up or repairs the woodwork of a house, the possession and the property are both in the employer, and the workman can have no lien. The most important class of property in which this species of lien is illustrated is shipping. Although the illustrations of the subject come almost entirely from English practice, there can be no doubt that a shipwright who receives a vessel into his dock has a lien on it for repairs, see 2 B. C. 98. The shipwright is, in this respect, distinguished from the furnisher of stores and outfit, who having no possession has no lien.—*Ib.*

(65.) *General Lien*.—A general lien may be created in reference to a course of transactions, by agreement of the parties; and in the application of manufacturing operations, where the goods are successively operated on and removed, and the accounts are settled periodically by the parties, a general lien may be created by the presumed agreement arising out of the method of transacting business.

This doctrine is supported by some cases relating to bleachers, reported 2 B. C. 109—*Hunter v. Austin & Company*, 25th Feb. 1794—*M'Culloch v. Pattison & Company*, 4th March 1794—*Aberdeen v. Paterson*, 20th Nov. 1812. In the case of *Handyside v. M'Intosh*, 14th Nov. 1805, H. 651, the Lord President laid it down as a settled principle, that when accounts are settled once a-year, any parcel of the effects to which the accounts apply may be retained for the balance.

The application of lien or retention for the remuneration of work performed on a commodity, brings on the question, how far in Scotland there is a general lien in favour of a person employed, over such commodities as are in his hands, for a balance against the employer, arising out of the course of transactions between the parties. If the right of lien over commodities were precisely of the same character as that of retention of money, (see above, p. 23,) there would be nothing further required than the lawful possession, provided it were not in trust or for a special destination, of a debtor's property, to constitute a right of lien. Although the line has not been sufficiently marked between the two species of retention, there is enough to show that in this respect the retention of commodities and the retention of money are quite distinct. As a prominent instance, the case of a cautioner may be taken. He has retention of any debt he may be owing to the party for whom he is cautioner until he is relieved, (see p. 24); but it has been specially decided, that a writer has no lien over his employer's writs in security of a cautionary obligation incurred. *Grant's representatives v. Robertson*, 28th Feb. 1800. *M. Hypothec*, Appendix, No. 1. In *Stirling & Sons v. Duncan*, 5th March 1823, 1 S. App. 389, it was decided in the House of Lords, reversing the decision of the Court of Session, that where a person sells goods as agent, and after the sale guarantees bills for the price, and has to pay on his guarantee, he has no lien on the goods, and cannot retain them from the purchaser's estate. The question of a general lien for debt arising out of simple possession, might have been tried in the case of *Reid v. Watson*, 16th Jan. 1836, 14 S. 223, but was specially avoided. Professor More has adduced many authorities tending to show that, by the older principles applicable to the retention of moveable goods, "a creditor who is lawfully in the possession of property which belongs to his debtor is entitled to retain it in

security of any claims competent to him; and that, till these claims shall be satisfied, neither the debtor himself, nor any person in his right, can demand the property so retained."—Notes on Stair, cxxxii. The right has been justly viewed as the counterpart of the right of arrestment, and has been held to extend to the custodian of the goods that remedy which any other creditor has, of keeping them in their place as a security for payment. Whatever may have been the old doctrine on the subject, however, the right of retention of moveables has undoubtedly resolved itself into a title nearly equivalent to that of lien in England, where there is no practice except in those places where foreign attachment exists by special usage, equivalent to our system of arrestment. In the older Scottish cases a claim of retention was even admitted on wrongous possession. *See* *Lees v. Dinwiddy*, 10th Dec. 1707, M. 2546; *Glendinning v. Montgomery*, 8th June 1745, M. 2573. In *Leslie v. Hunter*, 30th July 1752, M. 2660, the existence of a general lien in favour of a bleacher seems to have been taken for granted; but the retention of one piece of cloth for the price of work performed on another was rejected, because the second piece of cloth was successfully vindicated as the property of a third party. In *Harper's creditors v. Faulds*, 27th Jan. 1791, M. 2666, it was settled, that a bleacher has no general lien on which he may retain cloths put into his hands, for the price of bleachings coming within a previous account.

In England the establishment of certain general liens has been created by usage of trade, *e. g.* in favour of dyers, calico printers, packers, &c. For considerations how far these privileges may, by analogy, be extended to Scotland, see 2 B. C. 107.

(66.) *Mercantile Factor*.—A factor or other mercantile agent who receives the merchandise of his employer into his possession, has a general lien on whatever parcels of goods he may have at any particular time, for his balance against the principal.

3 E. 4, 21. *Chalmers v. Bassily*, 30th June 1666, M. 9137; *Stephens v. Creditors of York Building Company*, 14th Feb. 1735, M. 9140; *Broughton v. Primrose*, 17th Dec. 1814, F. C. Here the case of a factor was specially distinguished from that of a broker, who does not receive the effects into his possession, and acts merely as the means of communication between the parties. This limitation was confirmed in the House of Lords, in *M'Call & Co. v. Black & Co.* 2 S. App. 188. *Johnson v. Findlay Duff & Co.* 31st Jan. 1826, 4 S. 407, was a special case, in which goods of a joint adventure having been consigned by one of the partners to a third party to whom he was indebted, and by that third party consigned to an agent, the agent, as against the copartner, was found entitled to retention for the money specially advanced on the goods to the third party, but not for his general balance.

(67.) *Law Agent*.—A law agent has a lien over the title-deeds, securities, vouchers of debt, and other like papers of his employer, for his professional charges.

3 E. 4, 21. See various cases, *M. voce Hypothec*, Sect. 7. In the general case the agent is not bound to give up the papers to the bankrupt or any person interested until his claim is satisfied; but, in the case of a sequestration, the court has been in use to order the agent to deliver up papers, reserving the effect of his lien in the ranking.—*Johnstone v. Bell*, 23d Jan. 1823, 2 S. 144; *Paul v. Mathie*, 2d Feb. 1826, 4 S. 420. The efficacy of the right as against third parties was carried out to an extent disapproved of by several lawyers, in a series of decisions, by which the lien was held effectual against heritable creditors, even in the cases where their security was prior to the commencement of the agent's employment. *Hamilton v. Provenhall's creditors*, 9th Aug. 1781, M. 6253; *Campbell v. Smith*, 1st Feb. 1817, F. C.; *Campbell v. Goldie*, 15th Nov. 1822, 2 S. 16. In *Rattray v. Cruttenden & Co.* 19th Feb. 1828, 6 S. 568, inhibition was found, in the special circumstances, to bar the lien for an account incurred thereafter; but in *Menzies v. Murdoch*, 15th Dec. 1844, 4 D. 257, it was found that inhibition during the dependence of an action did not invalidate a subsequent deposit of title-deeds with the agent, though made for the purpose of affording him a security for his account. In *Burn v. Laidlaw*, 11th Feb. 1834, 12 S. 417, it was found that the lien did not secure the law agent of an heir of entail as against a creditor adjudging the lands and titles in virtue of an obligation of the entailor.

The agent may not only renounce the right, but may be held, from the circumstances in which he undertook the business, to have dispensed with it. See an instance in *Wilson v. Lumsdaine*, 29th June 1837, 15 S. 1211.

(68.) The lien only covers the agent's professional charges, and not money advanced to his employer, or expended in his service.

Cuthberts v. Ross, 1st July 1697, 4 B. S. 374; *Lidderdale's creditors v. Nasmyth*, 5th July 1749, M. 6248; where the lien was found not to cover a sum paid as nonentry and relief to the crown. In *Skinner v. Paterson*, 31st May 1823, 2 S. D. 354, lien was refused for cash advanced; and in *Paul v. Dickson*, 1st June 1839, 1 D. 867, for commission on employments not strictly within the duty of a law agent. In *Inglis v. Renny*, 23d June 1825, 4 S. 113, an agent employed to borrow money was found entitled to cover with the lien the professional account of the lender's agent which he had paid. In *Walker v. Phin*, 8th June 1831, 9 S. 691, it was found, that the country agent's lien covered the account of the Edinburgh agent employed by him. In *Kemp v. Youngs, &c.* 13th Feb. 1838, 16 S. 500,

a London solicitor having paid costs awarded against his client in the House of Lords, and that sum, as well as the solicitor's own account, having been paid by the Edinburgh agent, the lien of the latter was found to cover the solicitor's account, but not the costs awarded.

(69.) *Banker*.—A banker has a lien over the bills and other negotiable instruments placed in his hands in the usual course of business by his employers, for the balance of his account.

In Scotland this right has not been the subject of positive decision in its favour, but its existence is admitted negatively in the decisions limiting its extent. It has been the subject of much illustration from decisions in England, of which the reference by analogy to Scotland will be found examined 2 B. C. 118, *et seq.*

As in other cases of lien, the banker cannot retain paper sent to him to be used for a purpose inconsistent with his holding it as a security for his own balance. So it has been decided where bills have been lodged with him to be presented for acceptance, *Matheson v. Anderson*, 12th June 1822, 1 S. 485; and where bills have been presented to be discounted and the banker declines to discount them, *Haig v. Buchanan*, 20th June 1823, 2 S. 412; *Borthwick v. Bremner*, 22d Nov. 1833, 12 S. 121.

(70.) *Carrier*.—A carrier has a lien on the goods which he conveys, for the price of conveying them.

See the nature of this lien more fully explained in the succeeding paragraphs, which relate to that class of carriers whose claims are the most important in commercial questions, and consequently in relation to bankruptcy.

(71.) *Shipowners*.—Shipowners have a lien on the cargo conveyed, for the freight, independently of any stipulation on the subject between the parties.

This is the general principle of a law in universal practice over the civilised world, of which the history is too well known to require recapitulation. It is chiefly illustrated by English decisions, which have borne on the illustration of two difficulties. The one is the question whether the contract is one strictly speaking of carriage by the shipowners' admitting of their having a lien, or is such a disposal of the ship as makes the hirer of it be properly the carrier. The other question relates to the criterion of such dereliction of possession as will dissolve the lien. The distinction in the former case is laid down in the last edition of

Lord Tenterden's work, thus,—“The owner of a ship, so long as he continues in possession of the ship, is in possession also of the goods carried by her; and his right to lien in them, for the freight due in respect of them, whether by charter-party or under a bill of lading, has never been questioned. He may, if he think proper, part with that possession: he may demise her for a term, surrender all control over the ship itself, the appointment of her master and mariners, and even relieve himself from responsibility for wages and repairs. If he do so, the person to whom he lets the ship, who is called *charterer*, becomes owner *pro tempore*; the rights of the absolute owner are suspended, and among them his right of lien for the freight of goods carried by his ship.”—(Abbott on Merchant Ships, 7th edition, 288-9.) The leaning of the courts has been to hold the contract or charter-party as keeping possession in the owner, and the continuance of his lien, unless the contrary be very distinctly borne in the terms of the contract. So lately as the year 1816, in the case of *Hutton v. Bragg*, 7 Taunt. 14, Abbott 290, the Common Pleas admitted a principle which is said to have produced some alarm among ship-owners, that a ship let for the voyage is dissolved from the owner's lien. Subsequent decisions were more favourable to the continuance of the lien. See *Tate v. Meek*, 2d May 1818, 8 Taunt. 280. *Yates v. Railston*, 8 Taunt. 293. *Yates v. Maynell*, 8 Taunt. 302. In *Saville v. Campion*, 7th May 1819, 2 Barn. & Ald. 503, in which Lord Tenterden gave judgment, the case of *Hutton* was the subject of inquiry, and the rule was founded on the terms of the contract, depending on their expressing or not expressing a demise or change of possession. The freighter had in this case a supercargo with authority over the stowage, but the conduct of the ship was in the hands of the master appointed by the owners, and so it was found that the lien continued. So in *Christie and Others v. Lewis*, 2 B. & B. 410, and *Campion v. Colvin*, 27th May 1836, 3 Bing. new Cases 17, apparently the last case on the point. The right to lien may be specifically discharged in the contract, or it may virtually be discharged by a stipulation to pay freight at a fixed time before or after delivery, *Lucas v. Nockells*, 4 Bing. 729.

Questions regarding the criterion of delivery, and the consequent dissolution of the lien, rest on the same principles as other questions of delivery in connexion with the bankrupt law, (see below, Book II. Chap III.) It has been decided in England that there is no lien for demurrage or for pilotage and port charges, *Faith v. E. I. Co.* 4 B. & A. 630; *Birley v. Gladstone*, 3 M. & S. 205; nor for wharfage dues, *Bishop v. Ware*, 3 Camp. 360.

(72.) The lien for the whole freight extends over all the constituent parts of the cargo, and thus, though part be delivered, the rest may be retained.

Malcolm v. Bannatyne, 15th Nov. 1814, F. C. where the agent

receiving the latter portion of the delivery subsequently to his knowing of the bankruptcy of his constituent, the right of lien was held to be reserved. In England it was decided that where two bales were consigned to the same person on separate bills of lading, there was a lien on one for the freight of both, *Sodergren v. Flight*, 6 East, 622; *Abbott*, 377.

(73.) The shipowners' lien is particular, and not general; and thus it will not cover a general balance, or be enforceable against one cargo for the carriage of another.

Stevenson v. Likly, 18th Nov. 1824, 3 S. 291. Here there was a current contract to convey goods, and an attempt was made to hold certain parcels for arrears.

It may be a question how far a general lien may be created in favour of the shipowner by special notice or advertisement. In the case of *Ridley v. Sloan*, 2d Feb. 1837, 15 S. 469, there was a special notice to the effect that "all goods are subject to a lien in favour of the shipowners generally, not only for the freight and charges thereon, but for all previously unsettled freights and charges;" but the case was surrounded by specialties. The order was given by J. S. Bell, but he became bankrupt, and delivery, with proffer of freight, was demanded by F. A. Bell, as agent of the shippers. The receipt was merely in favour of "Mr Bell," but it was pretty clearly the intention to consign to J. S. Bell. The shipowners pleaded lien for an old balance due by J. S. Bell, but the plea was rejected.

(74.) *Bonded Warehouse*.—When goods are landed in docks under the warehousing act, they continue subject to the lien for freight, and the directors or proprietors of the docks are bound, on receiving notice, to hold them for the benefit of the party to whom freight is due until he is paid, or the amount claimed deposited.

3 & 4 Wm. IV. c. 57, § 47. On the corresponding clause in the previous act it was decided that the preservation of the lien only held where the warehousing took place under the injunctions and with the sanction of the act, *Johnston v. Duncan*, 16th May 1827, 5 S. 660.

(75.) *Excise Duties*.—The crown has, by the excise laws, a lien on the following subjects:—"All goods and commodities for or in respect of which any duty of excise is or shall by law be imposed, and all materials and preparations from which any such goods are made, and all stills, backs, vats, coppers, cisterns, tables, presses, machines and machinery, vessels, utensils, implements, and

articles for making or manufacturing or producing any such goods or commodities, or preparing any materials, or by which the trade or business, in respect of which the duty is or shall be imposed, shall have been or shall be carried on."

4 & 5 Vict. c. 20, § 24. In this act, (§ 23) the provisions of the excise regulations act, 7 & 8 G. IV. c. 53, § 28, were repealed, as being too general, and the above more specific enumeration was substituted.

(76.) The circumstances under which the crown possesses its lien are when the effects are "in the custody or possession of the person carrying on such trade or business, or in the custody or possession of any factor, agent, or other person in trust for, or for the use of the person carrying on such trade or business."

Ibid. But as stated below, there is a difference in the circumstances in which the implements, &c. may be relieved from the lien, and those in which the commodities may be relieved. Under the older acts it became sometimes a question how far goods, the property of third parties, if put into the hands of a manufacturer, to go through an exciseable process, might not be liable for that manufacturer's arrears of duties. See *Rex v. Tregoning & Others*, 8th Feb. 1828, 2 Y. & J. 132. The vagueness of the enumeration in these statutes, too, left it open to question whether the landlord's fixtures might not be seized for arrears, due by a tenant occupying the premises for an exciseable manufacture, but these doubts have been removed.

(77.) The charges to which such subjects remain liable are, 1st, "All the duties of excise which, during the time of any such custody or possession, shall be or shall have been charged, or become chargeable on, or be in arrear, or owing from or by the person carrying on such trade or business." 2d, "All penalties and forfeitures, which, during any such custody or possession, shall be or shall have been incurred by the person carrying on such trade or business," for any offence committed against any of the excise acts.

4 & 5 Vict. c. 20, § 24.

(78.) The goods, materials, and preparations, and also the utensils, remain liable to these charges, "by whomsoever and by whatsoever title the same may be claimed;"

and wherever they are found they may be seized under writ of extent or other process, as if they were in the custody of the person originally liable; but where "any goods or commodities," liable to duty, have been taken account of and charged duty by the proper officer, if they be "fairly and *bonâ fide*, and in the regular and ordinary course of trade, sold, disposed of, and delivered into the possession of the purchaser thereof for a full and valuable consideration," before the teste of an extent, or the issuing of any process, they are secure in the hands of the holder, on whom, however, lies the burden of proof that they have been fairly purchased and received as above.

4 & 5 Vict. c. 20, § 24. This is an amendment of the 7 & 8 G. IV. c. 53, § 28, which made the crown's lien, or more properly speaking, in this instance, hypothec, indefeasible, so that it followed exciseable commodities wherever they went.

SECT. 3.

TACIT HYPOTHECS.

In the following propositions, hypothec, as distinct from lien, is considered as a right of preference over moveable property which is not in the possession of the party enjoying the right. This limitation may not be found strictly in accordance either with the etymology of the word, or with its occasional use both in the nomenclature of our own and of foreign systems of law. When employed, however, with reference to moveable effects other than money, the tendency of late practice has been to create this distinction, and an adherence to it appears to be useful. The title which a law agent has to retain writings in payment of his account, though frequently called a hypothec, has, in accordance with this distinction, been considered under the head of lien, as it infers possession. An agent's preference over funds awarded in a litigation for the expense of conducting it, although it is characteristically distinct from other hypothecs, is considered in the present section, as there is no other department to which it appears with more propriety to belong. For the reasons stated above, p. 51, the subject of conventional hypothecs has been avoided.

(79.) *Superior for Feu-duty.*—The superior has a hypothec for his feu-duty. It is founded on the same principles as the landlord's hypothec, and there is no ground for holding that any classes of subjects, liable to the landlord's hypothec, are exempt from it. It has been

specially found to cover *invecta et illata* in urban tenements.

2 Craig, 9. 11. Omnes autem fructus, non solum coloni, sed etiam emphyteutici, feudi domino consentur obligati pro annua mercede seu canone. 2 St. 4. 7; 2 E. 6. 63; *Stor-mouth v. Andersons*, 14th July 1675, M. 10514. *Youille & Others v. Lawrie*, 24th Jan. 1823, 2 S. 155, is the case in which it was found that the superior's hypothec covers *invecta et illata* in urban tenements. Certain builders took a building feu, and were sequestrated, while materials for building, and their own household furniture, were on the premises. These articles, with the working tools, were sold by the trustee on the sequestrated estate, and were revindicated as coming under the superior's hypothec. It was strongly urged in this case, and the plea seems to have weighed with some of the judges, that a decision in the superior's favour would be a virtual extension of the right of hypothec to the holder of a real security, whose remedy should be limited to a poinding of the ground. In the feu-contract, the duty, amounting to £276, was declared not only to be in consideration of the feu-right, but of £1990 advanced by the superior.

Craig says, that the superior's hypothec is preferable to the right of the crown. The revolution which has taken place in the old views relative to the precedence of the landlord's hypothec over the crown's preference, is mentioned below, (sect. 6.) It would doubtless be found that the superior's hypothec is posterior to the crown's preference, as not coming within the provision of the 6th Anne, c. 26, § 8, exempting "any real estate in Scotland," from the prerogative writ of extent. This exemption applies to execution carrying heritable property, not to that affecting such moveables as may be attached by the holders of heritable rights.

(80.) *Landlord for Rent*.—A landlord exercises a preference over the moveables on the subject let, by virtue of his right of hypothec, for payment of his rent, and the right is taken by an assignee to the rent.

1 St. 13. 15. 2 E. 6. 56. *Wedderburn v. Mann*, 23d July 1707, M. 10399. See *Hunter on Landlord and Tenant*, 676, *et seq.* M. St. lxxxi. *et seq.*

(81.) The landlord's hypothec is defeated by the crown's writ of extent; and it is posterior to the superior's hypothec, to the preference of farm servants for their wages, and to the preference for funeral expenses.

See above, pp. 2 and 3, as to servants' wages and funeral expenses; and below, sect. 6, as to the crown's extent. For the precedence of the superior's hypothec, see 2 E. 6. 63; and the authorities adduced in *Ross's Lectures*, ii. 392, *et seq.* and *Hunter on L. & T.* 710.

(82.) *Agricultural Subjects*.—The right of hypothec in agricultural subjects, extends over the fruits, and the tenant's live stock.

1 St. 13. 15. 2 E. 6. 57. Over the fruits the hypothec is simple and absolute, with the limitations stated below. Over the live stock it is general, not tying up the tenant from disposing of any particular animal. It was at one time doubted if animals belonging to third parties taken in to graze, were liable to the hypothec, but it was twice decided that they are not,—*Brown v. Sinclair*, 1st Dec. 1724, M. 6204; *M'Kye v. Nabony*, 4th Dec. 1780, M. 6214. It is matter of question whether hypothec extends over implements and furniture in agricultural subjects, see *Hunter*, 680-683, and authorities there cited.

(83.) *Urban Subjects*.—The right of hypothec in urban tenements extends over all the furniture used by the tenant, whether it be his own or hired.

2 E. 6. 64. It has been repeatedly decided that hired furniture is liable, *Wauchope v. Gall & Ross*, 30th Nov. 1805, 2 B. C. 30, *Hunter*, 686. *Penson & Robertson* petitioners, 6th June 1820, F. C. It is questioned whether it extends to furniture gratuitously lent, see *Anon.* July 1672, 2 B. S. 670; *Wilson v. Spankie*, 17th Dec. 1813, F. C. The furniture is held to include books, paintings, plate, table linen, &c. Whether it includes wearing apparel or the effects of inmates are disputed points. *Hunter*, 685.

(84.) *Limits of Landlord's Hypothec*.—The hypothec over the crop is for the rent of the year of which it is the crop, and it subsists so long as the rent is unpaid, and the crop in the tenant's possession. The hypothec over other effects is general over them all, for each term's rent as it falls due, and subsists for three months after the term.

2 E. Pr. 6. 26. Authorities in 2 B. C. 33; *Hunter*, 693—697. The older decisions in favour of the principle that the crop of one year is not under hypothec for the rent of another, were confirmed by *Horn v. M'Lean*, 5th Feb. 1830, 8 S. 454. See *Stewart v. Rose*, 2d Feb. 1816, *Hume*, 229; *Cassilis v. Ramsay*, 23d Nov. 1816, *Hume*, 230.

(85.) When crop is removed during the subsistence of hypothec on it, it is subject to a right to be revindicated by the landlord, unless it have been sold by bulk in open market. With regard to other effects the landlord's hypothec until the expiry of the three months as above is

preferable to the rights of creditors or of other landlords, and follows the effects if they are removed.

1 St. 13. 15; 4 St. 25. 2 E. Princ. 6. 26. *Hay v. Keith*, 25th July 1623, M. 6188, where it was decided, that "the crop and corns growing that year were *ever* affected;" and the hypothec subsisted after the lapse of seven or eight years. No limitation is any where stated to the duration of the hypothec if the crop is unremoved, but under modern husbandry it is not likely that any case of so long an interval even as the above will occur. *Hepburn v. Richardson*, Jan. 1726, M. 6205; *Christie v. Macpherson*, 14th Dec. 1814, F. C. is the case where the doctrine of the preference over another landlord within the three months as above was confirmed.

(86.) *Sublease*. Where the tenant subsets without authority to do so, and the landlord has not sanctioned the sublease, there is hypothec over the subtenant's effects for the principal tenant's rent. When, however, the landlord has sanctioned a sublease, he enjoys hypothec over the subtenant's effects only by way of a preference over the intermediate tenant, and payment of the rent to such tenant, when the proper term has come, extinguishes the hypothec.

2 E. 6. 63. *Fowler v. Cant and others*, 5th March 1630, M. 6219, where the landlord was preferred to one who claimed as purchaser of grain from a subtenant. *Traquair v. Cranstoun*, 2d Feb. 1667, M. 6221. In *Saltoun v. Club*, 25th June 1700, M. 6224, it was found that there was hypothec for the whole rent over the effects of a subtenant of a part. It seems still questionable whether, when there is an express or implied authority to sublet, and it has been exercised, but the exercise has not been assented to by the landlord, his hypothec exists in full as against the subtenant? It was found, in *Blane v. Morison*, 8th March 1785, M. 6232, that it did not; but this was a special case. "There was," says the reporter, "a great diversity of opinion among the judges, and it was observed on the bench, that this decision was not to be viewed as determining in general that the landlord's hypothec, when subsetting was not prohibited, could be excluded in consequence of payments made, after the legal term, to the principal lessee. The special power to subset which here occurred, and the long and uninterrupted use of payment by the subtenants, seemed to have considerable weight with some of the judges." Their giving weight to this latter circumstance must have been on the ground that the landlord's knowledge of it implied assent. In the report of the case of *Saltoun*, as above, the expression is, that the subtenant is fully liable for the principal rent, "unless he [the landlord] had accepted him as a sub-tacksman."

(87.) *Hypothec in Competition with Sequestration.*—In the case of a sequestration under the bankrupt statute the landlord's right of hypothec remains. He is not in the position of an ordinary security-creditor, who is merely entitled to preference in the ranking; but he may proceed with the execution of his right by sequestration for rent, as if there had been no sequestration under the bankrupt act.

2 and 3 Vict. c. 41, § 96. *Henrys v. Hewat*, 14th Jan. 1818, Hume, 233,—a decision on the corresponding provision in the old act.

(88.) *Law-Agent.*—An agent conducting a law-suit has a right, commonly called a right of hypothec, to take a decree for expenses in favour of his client, in his own name. He has this right independently of any question as to the solvency of his client. A party cannot, by withdrawing or by collusive settlement, after the cause has been called in court, defeat it, and compensation is not pleadable against the agent's decree on the ground of a debt due by his client to the party against whom decree is taken.

Russel v. Greig, 28th Jan. 1826, 4 S. 403; *Hamilton v. Bryson*, 17th June 1813, F. C.; *M'Lean v. Auchinvole*, 29th June 1824, 3 S. 190; *M'Tavish v. Pedie*, 13th June 1826, 4 S. 704; *Smith v. Gemmill, &c.* 9th July 1802, M. 6257. The pursuer's agent's right to proceed to the end of securing his expenses, is defeated by a compromise on the day of compareance in a summons. *Anderson v. Walker*, 13th Jan. 1830, 8 S. 299. On this subject see 2 Bell's Com. 35-39; Bell's Pr. 1388-1395; Shaw's Digest, *vs.* Agent and Client, 333-373. It is not necessary here to enter minutely into this form of preference, because it is one which can scarcely ever come into competition with others in the ranking of creditors, excepting in the circumstances to be stated in the immediately succeeding paragraph. It is a right to get decree, and, of course, until that is awarded, there is no fund over which there can be a preference. When the decree is awarded it is in the same position as any other, and will be effectual according to the diligence proceeding on it. In a ranking which occurred in *Greig and Morton v. Christie*, 16th Dec. 1837, 16 S. 242, regarding the disposal of a residue of a deceased's alimentary allowance, it was found that a law account incurred in the defence of the deceased's right to the fund was preferable over other debts, and particularly over other law expenses.

(89.) Where expenses are awarded, but the agent has

not taken the decree in his own name, he can establish a preference by notice to the party that the sum is due to him; but if an arrestment be executed anterior to this notice, it will have precedence over the agent's claim.

McKenzie v. Ross, 13th June 1823, 2 S. 401. *Stephen v. Smith*, 1st June 1830, 8 S. 847, where an arrester was preferred. Professor Bell reports the case of *Mill v. Wright*, 12th Jan. 1802, where a litigant, who had got expenses against his opponent, having arrested the amount and received bills from the debtor to clear off the arrestments, and indorsed the bills to his agent within sixty days of his bankruptcy, the transaction was found not affectable by the act 1696, as going no farther than to vindicate to the agent his preference. 2 B. C. 37.

(90.) The law agent employed by a trust has a preference on the trust funds in his hands, over a trustee's claim for advances to the funds, and for commission, and his preference is not defeated by arrestment.

Wight's Trustees v. Allan, 12th Dec. 1840, 3 D. 243. There were specialties in the case which prevented the question from coming out more broadly than as above stated. The agent had in his hands a deposit receipt for the money, and it was questioned how far this was possession of the money, or how far he might have a lien on the receipt if it should be the case that the bank could not be compelled to pay to any one but the holder of the receipt. It seemed not to be doubted that, presuming the money at the agent's disposal, he had a preference. But it was an opinion receiving considerable support, that though held in the hands of a third party, the agent had a preference corresponding to such of his charges as were anterior to the arrestment.

(91.) *Mariners*.—The mariners who work a vessel have a preference over the freight for their wages, which is generally termed a hypothec.

3 E. 1. 34. *Sands v. Scott*, 6th Jan. 1708, M. 6261. It is generally admitted that the mariners hold a security over the vessel itself, but it is not clearly fixed whether this be of the nature of lien giving a right to retain possession, or of the nature of hypothec existing after possession is parted with. See 1 B. C. 513.

SECT. 4.

INHIBITION.

(92.) Inhibition is a prohibitory writ personal to the individual against whom it is used, prohibiting him from doing any voluntary deed to affect his heritable estate, and conferring on the inhibitor a privilege of reduction in so far as he may be affected by contravention.

4 St. 50. 2 E. 11. The writ being personal to the inhibited, applies to acquisitions subsequent to its date, as in *Gordon v. Campbell*, noticed below, p. 75, where it was admitted as a ground of reduction of a voluntary security on an estate to which the inhibited person succeeded after the inhibition. The converse of this is illustrated in *Roberts v. Potter*, 14th May 1829, 7 S. 611, where an heritable bond had been granted *spretà inhibitione*, but the person inhibited having died, and his heir having sold the land to the bondholder, and allowed him to retain the portion of the price effeiring to the bond, the transaction was found not affectable at the instance of the inhibitor, because the inhibition did not in any way restrict the heir's absolute right of property. The precise limits of the operation of inhibition in respect of the class of property affected by it were defined in *Scot v. Coutts*, 15th Jan. 1750, M. 6988, where it was found that it was commensurate with adjudication, and applied to the subjects affectable by that diligence.

For a full exposition of the circumstances in which inhibition may be used, and the method of using it, see *Bell's Com. ii. 141, et seq.* and *More's Stair, cccxxiii. et seq.*

(93.) *Simple effect.*—When it does not come in competition with the securities, voluntary or judicial, of anterior creditors, inhibition has the effect of a preferable security in favour of the inhibitor, striking at all voluntary alienations of the debtor's real property, and at all proceedings to attach it for debts contracted subsequently to the inhibition.

McLure v. Baird, 19th Nov. 1807, F. C. Here the person inhibited had sold the land. To counteract a reduction by the inhibitor, the purchaser acquired other debts, and adjudged. It was found that as the sale was valid so far as regarded creditors who had not inhibited, the land was out of the hands of their debtor, and not liable to be affected by their diligence, while the conveyance could not affect the right of the inhibitor. The Lord President said,—“By the inhibition the sale to Baird is reducible as to the inhibitors, Maclure, &c. Then, by the sale, all

diligence against this tenement by the other creditors of Reyburn is void, since the property was carried out of him, by a conveyance valid as to them, before that diligence was executed. The adjudication, therefore, on their debts, is of no effect at all, and can never compete with the inhibitors, if they should adjudge even now. This they might do, and their adjudication would still be the only effectual adjudication of this tenement. But it is not necessary for them to do this, because they must be paid in full by the purchaser, Baird, who cannot hold the estate, without getting this debt purged on which the inhibition has been raised." This decision was avowedly a confirmation of that given in *Monro v. Gordon*, 19th July 1777, M. *Inhibition*, App. No. 1. A voluntary purchaser *spretâ inhibitione* paid off the inhibiting creditor's debt, and was found to have a preference over arresters of the price. A like decision was given in *Lennox v. Robertson*, &c. 19th Nov. 1790, H. 243, where the Lord President remarked: "In a question with the inhibitor, the estate is as if it were still the debtor's property, which entitles him to adjudge. And if any other creditor had inhibited before sale, he also would be *pari passu* preferable. But this can go no farther. To all the other creditors the purchaser has a right to say, I will not pay till you purge the encumbrances."

(94.) *Competition with Voluntary Securities and Subsequent Adjudications.*—An inhibiting creditor can neither be benefited nor injured by voluntary alienations *spretâ inhibitione*; and so, if there be inhibition, and a posterior heritable security, and the inhibitor adjudges and ranks with *pari passu* adjudgers, he is entitled to draw back from the heritable creditor such a sum as will increase his dividend to what it would have been had there been no subsequent heritable security; but he is not entitled to take advantage of that security to the effect of drawing more than he would have obtained had it not existed.

Gordon v. Campbell, App. 2d August 1842, 1 B. App. 563. This was a reversal of the decision of the Court of Session, 26th Feb. 1841, 3 D. 629. Here an inhibited debtor, W. S. Glas, had succeeded to property of his father, Dr Glas, and after the succession, granted a bond and disposition in security over part of the estate so acquired. His father had incurred debts, but all difficulty as to whether these were to be considered as distinct from debts of the son, was removed, by the ancestors' creditors not having done diligence within the three years. A process of ranking and sale proceeded, which had the effect of a general adjudication, giving a *pari passu* preference to all creditors having particular preferences. The heritable bond had a preference over subsequent adjudications, but the main question

came to be how the inhibiting creditor, Campbell, stood in competition with the bondholder, Gordon. The Lord Ordinary, Cuninghame, remitted to the common agent, James Webster, S.S.C. of the principles of whose instructive report the following outline is given in the report of the decision :—

“The common agent, in his report, adopted these three principles,—1st, That on account of the nature of the process, Campbell was entitled to the same privileges as if he had obtained decree of reduction of Gordon's bond *ex capite inhibitionis*; 2d, That the inhibition was not effectual to exclude or create a preference over the debts which had been contracted by Dr Glas, the common debtor's father, in respect when the inhibition was used, the property had belonged to Dr Glas, and the common debtor could not take up the property by succession, without at the same time becoming liable for his father's debts; 3d, That the inhibitor was neither to suffer loss, nor to derive benefit from the bond granted to Gordon. In the application of these principles, he calculated the funds as at March 1840, and also the extent to which they were diminished by Gordon's bond as at that date. He then ranked Campbell's debt upon the whole funds *pari passu* with the claims for debts which had been contracted previous to the inhibition, and with the claims of Dr Glas's creditors, and thus ascertained that the dividend which Campbell would have received, if the bond to Gordon had not been granted, would have been £748, 16s. 11d. But if the funds were stated as diminished by Gordon's bond, and if the debts contracted after the inhibition were included in the ranking, Campbell's dividend was only £177, 11s. 11d. The common agent, therefore, proposed that Campbell should be allowed to draw back from Gordon, and those other creditors, an amount sufficient to make up the dividend which he would have drawn, if neither Gordon's bond had been granted, nor those other debts had been contracted. The deficiency was allocated as follows:—

1. From Mr Gordon, ...	£569	4	11
2. From claimants on debts contracted subsequent to the inhibition, ...	2	0	1
Campbell's dividend from the funds still <i>in medio</i> , ...	177	11	11
Total sums to be drawn by Campbell at 10th March 1840, ...	£748	16	11 ”

The Lord Ordinary appointed the inhibitor to be ranked in terms of the report. This decision was in accordance with the principle laid down by Professor Bell as that which was derivable from the case of Cockburn of Langton. He says, “By this mode of ranking the creditors having real preferences are made to draw in the first place; and then, by a subsequent operation, the holders of exclusive rights receive back from those creditors whose

preferences are affected by their rights, the difference between the sums to which they would have been entitled on a division had the claims affected by their right of exclusion not existed, and the sums drawn by them upon the first division: so that, upon the whole, the excluding creditors draw precisely what they would have been entitled to had the rights affected by their diligence been out of the field." (2 B. C. 514.) The rule laid down by the court in the case of the ranking of the Langton creditors was the same in other words,—“The rules established by the Lords were these,—1st, That an inhibitor adjudger did not simply reduce posterior annualrenters, but only in as far as these annualrenters were prejudicial to the inhibitor; and found that inhibitors would draw such a share of the rents, or in case of sale, of the property of the estate, as would have belonged to him, if no posterior voluntary rights had been granted; and found, that anterior creditors, adjudging within year and day of the inhibitor, could not be prejudiced by the inhibition; but that anterior creditors adjudging, would draw the same share of the common debtor's estate as if there had been no inhibition used.”—Cockburn's Creditors competing, 11th Jan. 1709, M. 2883.

In bringing Gordon's case to the inner-house, however, where the question as to the incidence of the inhibition in competition with the voluntary security appears to have been for the first time entertained, the court seem without farther inquiry to have acceded to the plea of the inhibitor, that as his inhibition struck at the voluntary security, it carried in the inhibitor's favour whatever that voluntary security would have kept from the adjudgers. This was reversed in the House of Lords, where the rule laid down by Professor Bell was adopted. It was remarked in the House of Lords that the Court of Session would have undoubtedly adopted the same view if the authorities had been fully placed before them.

Lord Campbell said,—“The question is, whether an inhibitor, under the circumstances, is to be placed in a better situation than he would have been in, if the transaction contrary to the inhibition had never taken place? The general rule, as laid down by all the institutional writers, ancient and modern, and founded on very solemn decisions, is, that inhibition being only a negative, or prohibitory diligence, the inhibitor can neither be prejudiced nor benefited, by a transaction *opretâ inhibitione*.

(95.) *Competition with Adjudication*.—An inhibition, not followed by adjudication, gives no preference to the inhibitor, if the estate be insufficient to satisfy the adjudgers on debts contracted anterior to the inhibition.

Mill v. Nicolson's Creditors, 9th Dec. 1697, M. 6963. The inhibition not being a diligence executorial, but giving a mere prohibitive privilege to the inhibitor, on which he can reduce an act in contravention, can give him no means of competition with anterior

creditors doing diligence. A farther point was however decided in this case which admitted of more doubt, and as the case is an old one, it is not unlikely that the question may be again opened. There were not only adjudications on prior debts, which it was clear the inhibition could not affect, but there were adjudications on posterior debts coming within the prohibitory influence of the inhibition. At the same time, the estate was insufficient to satisfy the debts of the creditors anterior to the inhibition. The question was, considering these posterior debts struck at, whether should the dividends they would draw accrue to the inhibitor, or should they go to increase the dividends of the other adjudgers? In favour of the inhibitor it was represented that the adjudgers should not profit by a prohibitory writ which he had sued out, and the use of which was personal to himself. In favour of the adjudgers it was argued, that the inhibitor should not be benefited by the circumstance of the debtor having incurred debts after being inhibited. The court preferred the adjudgers, and Professor Bell approves of the judgment as a rule (2 B. C. 516.)

SECT. 5.

ADJUDICATION.

(96.) *Nature*.—An adjudication is held to be a security of the nature of a pledge, the extent of which is not affected by partial payment, but which continues to bind the estate until the whole debt on which it proceeded is paid.

2 E. 12, 67. *Loudon, &c. v. Ross*, 20th Nov. 1734, M. 14114, Elchie's *Ranking and Sale*, No. 3; Auchinbreck's creditors *v. Lockwood*, 21st July 1758, M. 14129, 5 B. S. 363. The propriety of the doctrine was much doubted by Professor Bell, 2 B.C. 533; but it was confirmed in *Dalrymple's Trustees v. Cuthbertson*, 18th May 1825, 4 S. 16. See this subject examined above, p. 52.

(97.) *Pari passu Ranking of Adjudications*.—Where there are more than one adjudication against the same debtor, all those which are prior in date to the first effectual one, and all those posterior ones dated within year and day of the decree in the first effectual one, rank *pari passu*, as if all had been included in one adjudication.

1661, c. 62. The terms of the act are, That "all comprisings deduced . . . before the first effectual comprising, or after, but within year and day of the same, shall come in *pari passu* together, as if one comprising had been deduced and obtained for

the whole respective sums contained in the foresaids comprisings." It was questioned whether the limitation within year and day did not apply to anterior as well as posterior adjudications; but this was early settled in the negative. *Forbes v. Buchan*, 21st Dec. 1680, M. 265.

The three years' preference to the creditors of the deceased permit adjudications within the year and day of the first effectual to rank preferably, though that first effectual be against the ancestor, and the others against the heir for the ancestor's debt. The difficulty has been suggested, of the heir refusing to answer a charge to enter within the *annus deliberandi*, and it is said that the court will interpose, by allowing the creditor threatened with the defeat of his diligence to proceed as if the heir had renounced in his favour the benefit of the *annus deliberandi*. *Sinclair v. Caithness*, 8th Dec. 1781, M. 268, 2 B. C. 726. It is anticipated that, to secure the full *pari passu* preference to adjudgers of an ancestor's estate, they must be both within year and day of the first effectual, and within the three years during which an ancestor's creditors enjoy their preference. Those which are within the year and day, but beyond the three years, will enjoy the preference as against posterior adjudging creditors of the ancestor, but will do so subject to a joint ranking with those of the heir, having a preference over such of the heir's creditors as are not within the year and day. Adjudgers within the three years, but not within year and day of the first effectual, will rank preferably to those creditors of the heir who are likewise not within year and day, but it would be a difficult question to settle the principle of ranking between ancestor's creditors beyond the year and day, but within the three years, and creditors of the heir within year and day and within the three years. It would be probably held that, until the three years have expired, there is no opening for the *pari passu* preference of the heir's creditors as against the ancestor's. See 2 B. C. 732. Professor Bell is of opinion that the first adjudication made effectual, though by a creditor of the heir, whether within or beyond the three years, may be the first effectual to afford the preference to creditors of the ancestor coming within year and day of it.

(98.) The period of a year and day is calculated from the date of the decree of adjudication in the first effectual adjudication, and not from that of the diligence which makes it effectual; and, in like manner, the occurrence of the decree within year and day is the event which will bring a subsequent adjudication within the *pari passu* preference.

2 E. 12. 30. *Balfour v. Douglas*, 4th July 1671, M. 238; *Rickarton v. Traquair*, 27th July 1678, M. 240. It was in these

early cases pleaded that the period ran from the infeftment in the first effectual; but it was decided as above.

(99.) *Calculation of Year and Day.*—The lapse of a year is estimated by the recurrence of the same day of the month of the immediately following year; and thus an adjudication in which decree is obtained on the immediately following day of that month, is within the year and day.

Bangour v. Hamilton, 26th Jan. 1681, M. 248. Here the first effectual was dated 30th July 1679, and that on which a *pari passu* preference was claimed was dated 31st July 1680. It was found, "That the year was not to be counted by the number of days, but by the return of the day of the same denomination of the next year."

(100.) *Criterion of effectual Adjudication.*—In questions between adjudications, the point of time at which an adjudication becomes effectual is thus fixed by statute:—1st, If the holding be of the crown, the presentation of a signature in Exchequer, and registration of an abstract of it in the Register of Abbreviates of Adjudication; 2d, When the holding is not of the crown, the executing a general charge of horning, and recording an abstract of the charge in the register, as above.

54 Geo. III. c. 137, § 11. According to the act, the charge must be executed at the market cross of Edinburgh, and pier and shore of Leith. By 6th Geo. IV. c. 120, § 51, which substitutes execution of edictal citations at the Register-house to the above method, the change is expressly enacted to refer to citations "against persons forth of Scotland," and does not properly include this class of citations. It is recommended that the charge be executed in both forms. *Darl. Prac.* 428.

In burgage subjects, which in one sense hold of the crown, the general charge is sufficient. This is admitted in *Gordon v. Rae*, 11th Dec. 1822, 2 S. 78. It has been doubted how far it is rational that the form can apply where a superior adjudges the property of his vassal, as he would have to charge himself; but the purport of the act is, to take advantage of an old feudal form for establishing a uniform system by which the point at which each adjudication becomes effectual is marked. It is held in practice that the form of a charge to superiors is sufficient to make an adjudication effectual for the purposes of the act, though the superior's or the debtor's title has not been made real. *See Gordon v. Rae*, as above. Mr Brodie says, "I should be inclined to doubt whether it would be a competent procedure where

the debtor's right continued personal." Edition of Stair, 469. *See* *Pierce v. Lomond*, 22d June 1791, M. 244. Of course in such a case the charge itself cannot be efficacious towards the completing of the title, but sasine must be taken on the unexecuted precept, or the procuratory of resignation must be exhausted, as the case may be.

(101.) It is only in questions of one adjudication with another that this method of making effectual applies, and it will not make an adjudication effectual in competition with any other real right.

Chalmers v. Cunningham, 8th Nov. 1737; *Elchie's Adjudication*, No. 14. The act 1661 specially excepts its own application to securities or other *debita fundi*.

An adjudication may be made effectual independently of the criterions prescribed by the act, if there is no necessity to have recourse to the measure there suggested,—as where infestment may be obtained without charging the superior. Although tests were established, which put it generally in the adjudger's power to get his diligence marked with the character of a completed one for the purposes of the act, the publicity attached to the carrying the process through is trusted to, more than the register of abbreviates, as the publication of the diligence.

(102.) It does not deprive posterior adjudgers, within year and day, of their right to rank, that the first adjudication is extinguished by payment, nor will such payment render the second adjudication a *terminus a quo*, so as to admit within the *pari passu* preference adjudications within year and day of it, but not within year and day of the first effectual.

Streit v. Northesk, 15th Dec. 1672, M. 248.

(103.) *Intimation of First Adjudication*.—There are certain statutory forms of judicial publication calculated to enable creditors to be conjoined in the first decree of adjudication, the neglect of which renders the first adjudication null, viz. Intimation in the minute-book and on the wall, twenty sederunt days being allowed for the intimation before the cause can be called a second time.

54 G. III. c. 137, § 9. In a strong case, where it was shown that the twenty days not expiring until after the rising of the court, the object of the adjudication would be in a great measure defeated, unless the court shortened the intimation, the court held that they had no power to do so. *Badenoch and Turner*,

Petitioners, 9th March 1838, 16 S. 903. "The intimation is made by affixing a copy of the interlocutor, with the names of the parties and the clerk's mark, on the walls of the court. A certificate of the intimation is written in the summons on the elapse of the period of intimation." (Darl. Pract. 422.) As these operations cannot take place in relation to adjudications *contra hæreditatem jacentem*, such an adjudication cannot admit of others being conjoined with it, or be itself conjoined.

(104.) The court have been in the practice of refusing the order for intimation, if the defender instruct that the debt is paid or compensated, or that there is a right of retention over it; but the order has not been refused or suspended at the instance of trustees under a voluntary trust, or at the instance of the debtor, alleging that measures are in progress for the payment of his debts, or on the allegation that the pursuer has acceded to a supersedere.

Queensberry's Executors v. Tait, 11th July 1817, F. C.; Breadalbane v. Macdonald, 16th Jan. 1824, 2 S. 621; Harrowar's Trustees v. Couper's Trustees, 16th Feb. 1827, 5 S. 374, where it was maintained that it was incompetent for creditors to adjudge as against the granter of a trust-deed, without setting it aside, but this objection was repelled. Morison v. Hamilton, 9th July 1836, 14 S. 1126, where, in addition to the plea as to a trust, it was shown that the bill on which adjudication was led was prescribed. (But see as to this latter point Scott v. Brown, 11th Dec. 1828, 7 S. 192.) Campbell v. Campbell, 11th July 1828, 6 S. 1146, where the objector—the debtor—pleaded that a sale for behoof of creditors was immediately to be made under an act of Parliament giving such authority, the estate being entailed. Idle v. Fife, 6th March 1830, 8 S. 669. In Breadalbane's case, the pursuer had acceded to a trust, but the trustees had taken no steps to realise the trust funds. The case of Queensberry's Executors is the only one in which retention was admitted in bar of intimation, and Professor More says, "the soundness of this decision has been doubted." M. St. ccxcix. It was the case of a guarantee for the Queensberry leases, who had borrowed money from the Duke of Queensberry, whose executors led adjudication. The reduction of the leases being in dependence, and a claim of damages made against the guarantee, he pleaded retention, and, the Lord Ordinary having ordered intimation, the court recalled it.

In Shotton Malcolm & Co. v. M'Neil, 20th May 1834, 12 S. 609, where no defence had been lodged, but on hearing objections at the bar the Lord Ordinary ordered intimation, the court remitted to repone on paying expenses, and also empowered the Lord Ordinary to hear parties as to the legality of a motion for recalling intimation.

(105.) *Conjunction*.—In pursuance of the object of the intimation, any other creditors who, at the next calling, can show that they are by the nature of their grounds of debt, and the steps taken by them, in a condition to proceed to adjudge the estate in their own name, may, on producing the instructions of their debts, with summonses of adjudication libelled and signeted, be conjoined in the decree of adjudication. Both in the principal adjudication, and those conjoined with it, where they conclude for the penalties in bonds over and above performance, the court have authority to modify the penalty to the real and necessary expenses incurred in making the debt effectual.

54 G. III. c. 137, § 9. It seems that those who claim to be conjoined in a leading adjudication accept its chances of being successful, and must abide the result of whatever defences may be pleaded. In the case of *Forman & Nicholson*, 23d Feb. 1832, 10 S. 365, the defender obtained an order for a condescendence, and a second adjudger was found bound to await the issue, and not entitled to a separate decree.

(106.) *Statutory Nullity*.—Although the omission of any of the statutory formalities renders null the first process of adjudication, this is “without prejudice to its being brought forward again in more due form, or still conjoined with any after adjudication, and without prejudice to the validity and order of ranking of posterior adjudications, according to the rules of law.”

54 G. III. c. 137, § 9. Professor Bell thinks it is doubtful whether the clause will admit of a general conjunction with a posterior adjudication. (1 B. C. 724.) Under the earliest statutory regulation for conjunctions, they were to be made by the Lord Ordinary, “before whom *any* process of adjudication is called.” 23 G. III. c. 18, § 5. By the subsequent statute the phraseology was, the Lord Ordinary, “before whom the *first* process of adjudication,” &c. 33 G. III. c. 74 § 10. Under this it was held that there could not be conjunction with a posterior adjudication. *Campbell v. M'Lean's common agent*, 24th Nov. 1801, M. *Bankrupt*, App., No. 13.

The clause in the extant act commences with the same words, but there is a variation in a subsequent part of the section which may affect this matter. The old act simply enacts that the informal adjudication shall be null, without the reservation of its capacity to be subsequently brought forward in due form, or to be conjoined with any after adjudication. This latter reservation makes it open to conjoin with an adjudication which is not the

first called. It only, it is true, enables this first called one to be itself conjoined with one afterwards called, but the provision seems to indicate that the term "first called" is directory and not exclusive. If the first called, by reason of its informality, be not the first effectually completed, but be conjoined with one later called, will not all the others be capable of conjunction with the same later called? But it may be argued, that the words, "the Lord Ordinary, before whom the first process of adjudication against any estate for payment or security of debt is called," must be taken in conjunction with the characteristic of a first effectual adjudication, and must be held to refer, not to the first in order of calling, but to the first completed. It was, however, decided, in *Allisons v. Ballantine*, 19th Dec. 1805. M. *Adjudication*, App. No. 14, that it is not the first completed, but the first called, that is the adjudication with which the conjunction is to be made.

It may be a question whether the intimation on the minute-book and the wall are essentials of an adjudication capable of being conjoined with, so that if the first called be informal, it can only be conjoined with one which has been so intimated; or whether the intimation once made is effectual to all concerned? If conjunction were allowed with any adjudication not intimated in terms of the act, it might be maintained that there was not the complete statutory intimation for enabling the creditors to appear within year and day. In the case of *Allisons*, those who maintained that the term, "first," applied to the first completed, pleaded that the first completed was null for want of the statutory intimation.

(107.) *Equitable Facilities for Conjunction*.—Creditors to come within the requisites of the act as "in condition to proceed in adjudging their debtor's estate," if their debts be not liquid, must have them judicially constituted; and to this end the court has been in use to grant facilities, both for the completion of the act of constitution, and for the calling of the adjudication.

There must be a constitution of the debt by writ or decree. When there were two diets of citation, the court dispensed with the second on a summons of constitution on the passive title, the pursuer having restricted his demand to a decree *cognitionis causæ*, *Caunan v. Craig*, 16th Nov. 1794, M. 12005. It was found, however, that dispensing with the first diet was illegal; *M'Auley* Petitioner, 6th July 1749, M. 11992. *Watt's Creditors*, 11th Dec. 1800, M. *Process*, App. No. 2. In *Bontine v. Graham*, 19th May and 17th Dec. 1829, 8 S. 87, 263, the court granted decree of constitution, to the effect of adjudication, without waiting for a record, but reserving all objections. In *Erskine* Petitioner, 7th March 1822, 1 S. 377, the court dispensed with the induciæ in a summons of wakening of an adjudication. In *Scott*

v. Scott, 28th Jan. 1832, 10 S. 253, a summons of adjudication had been executed, but it was feared that the debtor had left Scotland, and there had been no warrant for citing him as furth of the kingdom. A supplementary summons was raised containing such warrant, and the court, on the petitioner's application, dispensed with the *induciæ* in both summonses, allowed them to be enrolled in the calling lists in the outer-house, limited the term for seeing to eight days, authorised the Lord Ordinary to dispense with the reading of the decree in the minute-book, and granted warrant to the clerks to give out immediate extract. In *Gregg Petitioner*, 21st Feb. 1839, 1 D. 544, the emergency on which the application for a dispensation was founded, was the circumstance that an agreement among the creditors not to raise separate diligence during the dependence of a litigation, had been disregarded. The *induciæ* were dispensed with, the summons was authorized to be called without abiding the course of the printed roll, and warrant was granted for immediately enrolling.¹

In all these cases all objections *contra executionem* are reserved, and it is said that the proper method of discussing these is by suspension at the instance of the debtor, which will be passed without caution. See *Darling's Practice*, 432.

(108.) *Sequestration*.—Sequestration, under the bankrupt act, is an adjudication of the whole estate of the bankrupt from its date, which is that of the first deliverance in the sequestration, and if that be within year and day after the first effectual adjudication, the adjudications are superseded by distribution under the sequestration act.

2 and 3 Vict. c. 41, § 82. See this subject considered in connexion with the Sequestration Act.

(109.) *Ranking and Sale*.—In a ranking and sale, the decree of sale is a general adjudication in favour of every creditor who may afterwards be included in the decree of division. The decree is held in all questions of ranking as of the first calling of the process, and consequently, if the calling be within year and day of the first effectual adjudication, the adjudications are superseded by the ranking. No separate adjudication can proceed during the process of ranking and sale.

54 Geo. III. c. 137, § 10. See this subject considered in connexion with Ranking and Sale.

(110.) *Adjudication in Implement*.—An adjudication in implement, for the purpose of completing a title, does

not afford a *terminus a quo*, admitting adjudications for debt to rank, though brought within year and day. Such an adjudication does not admit of adjudications for debt being conjoined with it, nor can it be conjoined with an adjudication for debt.

Campbell & M'Vicar competing, 17th June 1755, M. 277. But where there were several adjudgers of a personal right, and one of them made it real, by adjudging in implement against a disponent, it was found that his infestment accresced to the others. *Falconer v. Falconer's Creditors*, 27th June 1734, M. 243. See M. St. ceciv. and the proposition there considered, that "to make way for the *pari passu* preference of the statute, the adjudications must be of the same nature, and must attach the very same subjects." The following is part of a note of the Lord Ordinary (Cunninghame) in *Bontine v. Graham*, 5th March 1839, 1 D. 631: "Notoriously adjudications for debt, and adjudications in implement, are different processes, and do not admit of conjunction. The one is a diligence, carrying the estate to the adjudger under reversion only, requiring *intimation*, admitting of the conjunction of other creditors, and only the foundation of a permanent title to the fee, by another decree pronounced after expiry of the legal. On the other hand, adjudication in implement is a process for completing an imperfect title,—requiring no intimation,—admitting of no conjunction,—implying no further or future obligation on the defender."

The court grants facilities to adjudgers in implement completing their diligence, in so far as, in their efforts to make their petitioner's diligence serve as a succedaneum to an imperfect title, they are, along with adjudgers for debt, in the position of litigants requiring judicial interference. The most marked illustration of this is in the finding, that the provisions of the 54 Geo. III. c. 137, § 10, prohibiting separate adjudications during a ranking and sale, do not apply to adjudications in implement. *Wood v. Hutchison*, 1st July 1830, 8 S. 988; *Wood v. Scott*, 5th Feb. 1833, 11 S. 355; Opinions in *Bontine v. Graham*, 5th March 1839, 1 D. 631.

When a creditor adjudger is first infest, an adjudger in implement cannot, of course, have a preference, but all facilities will be given in the judicial procedure, to enable an adjudger in implement to complete his diligence. It would seem, too, that in the case of a competition between two adjudications in implement, the circumstance of one of them being a completion of a conveyance, and the other virtually a proceeding for the advantage of the general body of creditors, will be kept in view. This seems to have been the case in *Wright v. Murray*, 20th June 1821, 1 S. 92, a competition between two adjudgers in implement, one of a missive of sale, the other of a disposition *omnium bonorum*. The former had got decree in absence, which the latter opened up, on the ground of the missives not being stamped. Process

was sisted till they were stauiped. Both actions came on the roll together, that on the disposition *omnium bonorum* being first ; but the Lord Ordinary gave decree on the other adjudication in the first place, and then dismissed the prior on the roll in respect of that decree ; and the court adhered. In the competition of Hutchins, Cameron, & Wood, 26th June 1830, 8 S. 982, it was found, that neither the common agent in a ranking and sale, nor the creditor at whose instance it was raised, was entitled to appear, though they alleged they could state good grounds why decree of adjudication in implement should not be granted. Such appearance was compared to interfering with a disponee taking infeftment.

The case of Macgregor & Others v. Macdonald & Others, 9th March 1843, 5 D. 888, though not directly bearing on this point, throws light on the nature of competitions in which adjudications in implement constitute elements, and illustrates the disposition of the court to treat them, wherever there is no insuperable bar, and they are in implement of onerous transferences, not as diligences with which others can enter into competition, but as virtually the exercise of a power in the adjudger to complete his own title. Here two parties were infeft, each on adjudication in implement ; but, on the merits of their titles, the party last infeft was preferred. This adjudication proceeded on a bond and disposition in security for borrowed money. The other party who had got themselves first infeft, were trustees in a *mortis causâ* disposition, for the double purpose of paying creditors, and providing for children, which, the estate being insolvent, resolved itself into a trust for the former of these purposes. There were several specialties in the case. In the first place, the adjudger on the bond had got decree before the adjudgers on the trust-deed, and this was relied on in the decision, which, however, probably would not have been different, had the order in this respect been reversed. It was further much founded on, that the obtainment of the prior infeftment on the part of the trustees, was owing to their having refused him facilities for completing his title, which they were bound to grant. They were the superiors of the property, and, as such, were bound to enter an adjudger in implement. On the holder of the bond, however, obtaining his decree, they refused or delayed to grant him a charter of adjudication, but pursued their own adjudication of the *dominium utile*, which the truster had held by an incompleated title, and then granted a charter of adjudication to themselves. In the mean time, the adjudger on the bond and disposition having denounced the trustees as superiors, passed them over, and obtained a charter of adjudication in implement, and confirmation, from a more remote superior. In awarding this decision, the court lent a ready ear to any specialties on which the disponee last infeft on an adjudication could urge that he should be preferred to the personal creditors first infeft. To this effect they allowed influence to the fact of the disponee having got the first decree—a fact stated from the bench as appearing on the perusal of the

record, which does not appear to have been pleaded ; and they likewise allowed influence to the other fact, that the personal creditors being in a position to do so, had prevented the other from completing the first right. Whether, if there had been no such specialties, the court could have got over the fact of a first infeftment, is a difficult question. It was held by some of the judges, that the disponee in security should be preferred independently of the specialties ; but they appeared to think so in the view that the trust was not a trust for behoof of creditors, but a family settlement. The case of *Strachan v. Whiteford*, 9th Feb. 1776, M. *Adjudication*, App. No. 7, was much relied on by the trustees. Here, a person whose title was only a minute of sale, granted an heritable bond, on which the holder adjudged in implement, and was infeft. A subsequent disponee adjudging in implement, brought an effectual reduction of this title ; but the ground on which it was held effectual appears to have been that of *pluris petitio*,—the holder of a redeemable right adjudging irredeemably ; and thus it was no precedent applicable to the case where the creditor only adjudges purely in implement of his obligation.

(111.) *Adjudications not within the pari passu preference.*
—Adjudications beyond a year and day after the first effectual, not coming within the act, do not rank *pari passu*, either with each other, or with those coming within the act, and will be successively effectual in the order of their priority ; the first being effectual to the exclusion of the second, the second to the exclusion of the third, and so forth.

2 E. 12, 33. There is a question still considered unsettled, whether, in adjudications of subjects requiring sasine to constitute a real right in them, the criterion of priority is the date of the decree, or that of the sasine. Erskine is clearly in favour of the former alternative, and gives his reasons thus : “ Second apprisings, i. e. apprisings of subjects which have been already appraised by another creditor, require no sasine, even where sasine would have been necessary to vest the right appraised in the first appriser. For understanding this, it must be observed, that by the old law, the first appraising, when perfected by sasine, divested the debtor of the property, and consequently excluded all posterior apprisings ; but because it was competent to the debtor to redeem the first appriser’s right by payment, second apprisers, who appraised all the right competent to the debtor in the lands, carried to themselves by their diligence the right of reversion or faculty to redeem ; and as rights of reversion being merely personal, required no sasine, therefore posterior apprisers were, without the necessity of taking infeftment, preferable according to their dates.” 2. 12. 28. This view had the support of a decision, which was, however, dissented from by Kilkerran and seve-

ral other judges. Ranking of the Creditors of Tulloch, 27th Jan. 1756, M. 250, 5 Br. Sup. 310. The first effectual adjudger was infest in 1740. From July 1745 to November 1747, four other adjudications were adduced, but no infestment followed on them. In December 1747, there was another adjudication in which infestment was taken: it was found that this was not preferable to the other four, but that they were all respectively preferable according to the dates of the decrees, independently of infestment. The principle of this decision has been doubted, on the ground that adjudication is not, during the currency of the legal, a sale under reversion, but a mere *pignus prætorium*, a character with which it has been, by degrees, more and more completely identified, since it became substituted for the old form of apprising. The reverser continues to be the vassal, and he alone can enter as superior the sub-vassals holding of the feu. The reverser, and not the adjudger, is the person who holds a qualification as a freeholder.—This is regulated by statute (1681, c. 21), but that is held by commentators to be a provision merely declaratory of the common law. In *Wades v. the heir of Wade*, 11th Dec. 1760, M. 221, it was found that adjudications were carried in a disposition of “debts and sums of money real or personal.” In *Campbell v. Scotland*, 7th March 1794, M. 321, by which it was decided that a declarator of expiry of the legal was necessary to exclude the debtor’s right of reversion, the judgment was founded on the principle that “the general adjudication now in use, is evidently not a sale under reversion, but a mere *pignus prætorium*.” The same principle served as a foundation for a later decision, *Grindlay v. Drysdale*, 4th July 1833, 11 S. 896, to the effect that it is the reverser, and not the adjudger of a right of patronage who holds the power of presentation. Here the exercise of the right adjudged was found to be still in the debtor, and for this reason, that though the right was an object of commerce, from which a debt might be paid, its individual exercise was not so, and the adjudger’s rights being confined to what would legitimately go to the payment of his debts, did not include this exercise of judgment. In the fourth edition of his Commentaries, Professor Bell had laid it down absolutely that posterior adjudications need no infestment; but, in the sixth edition, he says, the rule “was laid down too absolutely,” (1 B. C. 727). Mr Brodie maintains, however, on grounds which seem fully to justify his opinion, that however it may stand in modern practice, the view properly conformable to the original character of the title is, that posterior adjudgers adjudge “the lands, not a right of reversion.”—Edition of Stair, 468.

SECT. 6.

EXTENT AND OTHER EXECUTION BY THE CROWN.

(112.) The crown's prerogative writ of extent issued against moveable goods, binds them, into whatever hands they may have passed, from the date of the teste, whether in questions between separate writs of extent, or in questions between the crown and a subject creditor.

6 Anne, c. 26, which extends the English law on this subject, as contained in 33 Hen. VIII. c. 39, and otherwise, to Scotland.—The Queen *v.* Arnold, West, 327.—The Queen *v.* Quash, Parker, 281.—The King *v.* Lambton, 5 Price, 428.—Tipper *v.* the King, 22d May 1830, 8 S. 785.—This case illustrates the impracticability of the application of an equitable remedy when the crown gets first in the race of diligence, by whatever means it has done so. On the other hand, the creditors at large are sometimes found to receive aid from the courts. Thus Lord Eldon mentioned an instance where he got out of bed, in the middle of the night, and sealed a commission of bankrupt, avowedly taken to defeat the crown's extent, an informal commission having been previously presented, which he refused to seal. Wydown's Case, 14 Vesey, 87.

(113.) An immediate extent holds a preference to an extent in aid finding the same property, though the date of the teste of the latter should precede that of the former.

The Queen *v.* Quash, as above.—This is carrying out the principle that the crown is to be preferred to a subject. The extent in aid is not a process at the instance of the crown, but at that of the crown's debtor, who proceeds by it against his own debtor, on the *fictio juris* that the recovery of the debt is necessary to enable him to pay what he owes the crown. It may be had at the instance of a surety for the crown debtor who has paid the debt. This process was liable to much abuse,—extents were taken for larger sums than the debtor was due to the crown, and persons dealing in exciseable commodities, or others who had to pay taxes or duties, used it for the recovery of their debts. By 57 Geo. III. c. 117, its operation was restricted to the amount of the original crown debt; its employment was confined to persons engaged in the collection of the revenue, or otherwise bound to account to the crown, and the sums recovered were made payable into the Exchequer.

(114.) *Competition with Assignee.*—A completed sale or assignment, passing the property anterior to the date of the teste, will defeat the crown's preference.

This was fully settled in the House of Lords, in the case of *Spears v. the Lord Advocate*, 18th June 1839, M.L. & R. 585, reversing in error the decision of the Exchequer in Scotland. Certain individuals were in partnership with certain others; and, to afford them a security against certain contingent obligations undertaken by both parties, the former granted to the latter an assignation of their share of stock in the firm in which both parties were partners. The assignation was intimated to the firm, and entered in its books. It was found that the stock so transferred could not be carried by an extent against the cedents. The judgment of the court below was founded on the assignation being in trust only, but this was not considered material to affect the question in the House of Lords.

This principle is very fully brought out in the opinions in *Giles v. Grover*, 9 Bing. 128. It may be difficult to decide how it will operate in relation to trusts for behoof of creditors. West says, (p. 115,) on the authority of *Rex v. Watson*, that "goods assigned by the defendant before the teste of the extent in trust for his creditors, if the assignment be not fraudulent, cannot be taken: even though the defendant were a trader within the bankrupt laws, and the assignment be an act of bankruptcy, and void as against the assignees." Probably in Scotland the crown might reduce a trust under the act 1696. It might have an interest where subject creditors would have none, because by the reduction it would gain a preference and not merely a right to rank *pari passu*. A case occurred in England in reference to the nature of the delivery which will take moveable goods out of the reach of an extent, from which it was decided that a parcel of bills and notes made up and sealed in a bank, and left in the premises to be delivered to the postman after the bank was shut, was not passed from the hands of the bankers; that if it had been delivered to the postman it would have been passed, and that indorsement does not pass bills without delivery. *The King v. Lambton*, 6th Feb. 1818, 5 Price, 428.—The contents of the parcel were destined to pay a balance on the general account with another banker. The parcel was left with a female servant, to be delivered to the postman, whose practice it was to call before business hours. Nearly at the time when he was expected there was a rap at the door; and the domestic, "believing it to be the postman calling, as usual, for the parcel, took it in her hand, and, upon opening the door, it was seized and taken from her by the sheriff."

(115.) *Effect in Bankruptcy.*—To give a person who acts as trustee or assignee under the sequestration or cessio

act, or otherwise, a preference over the crown, there must be an actual transference of the property. The crown, not being mentioned in the clause making the date of sequestration retrospective and identical with that of the first deliverance, is not affected by it.

In cessio, the decree is an assignation to the trustee, (6 and 7 Wm. IV. c. 56, § 16.) Under the old sequestration act, the adjudication to the trustee being the actual transference, was the effectual point. (54 Geo. III. c. 137, § 29.)—It is an old constitutional doctrine in England, which, in relation to this subject, has necessarily been adopted in Scotland, that the crown is not bound by acts in which it is not named. It has thus been repeatedly held, that, as the crown is not mentioned in the English bankruptcy statutes, the bankrupt's property is liable to be carried by an extent, unless there have been an actual previous assignment by the commissioners.—*Rex v. Pixley*, 16th Nov. 1725, Bunb. 202.—*Brassey v. Dawson*, 2 St. 978; a case relative to the crown's prerogative in a seizure under the land tax act.—*Awdley v. Halsey*; *W. Jones*.—In a case where the teste and the assignment were both dated on the same day, the crown was preferred.—*Rex v. Crump and Hanbury*; *Parker*, 126. By 1 and 2 Wm. IV. c. 56, § 25, the system of special assignment was abolished, and the estate was appointed to vest in the assignees from the date of the adjudication. By the same act, official assignees were appointed, instead of provisional assignees in town bankruptcies; and by the 5th and 6th Vict. c. 122, the same system was extended to the country, for the purpose of anticipating the crown. (Mont. 159.) This change cuts off, and renders unnecessary a remedy which was sometimes resorted to of obtaining a provisional assignment. This in some degree resembles the alteration in our own law. There is, however, still a difference between the two systems, which it is necessary to attend to. By the sequestration act the decree declares "the estates to belong to the creditors, for the purposes of this act." But, by the section relating to the confirmation of the trustee, (§ 78,) it is declared that the estate shall, "by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to and vested in him." As it is thus by virtue of the act and warrant that vesting is said to take place, a question may arise whether the previous declaration that the estate belongs to the creditors, will preclude the crown's extent from the date of the decree? In England, the declaration of election by the commissioners, filed in the Court of Bankruptcy, completes the assignee's title, but does not in any way create a vesting, because, from the time of the adjudication there has been a vesting in an official assignee.

(116) *Competition with Lien*.—A previous right of lien, such as that of a factor, wharfinger, or carrier, will preserve a preference in competition with the crown's extent.

The King *v.* Lee, 11th Feb. 1819, 6 Price, 369, where a factor, to whom goods were sent for sale, had acquired a lien by accepting bills. The King *v.* Humphrey, 4th Feb. 1825, M'Clelland and Young, 173, where the preference was admitted for a wharfinger's general lien for balance of freight and wharfage. Effect was given in Exchequer in Scotland to a banker's lien over the deposit of a person who was debtor in a bill discounted by the banker. The King *v.* the British Linen Company, June 1826, 2 B.C. 56.

(117.) *Sequestration for Rent.*—The preference of the crown is not barred by a landlord's sequestration, with warrant of sale; and, if the teste of the writ be anterior to the sale, it will bind the effects.

Robertson *v.* Jardine, 6th July 1802, M. 7891, where the principle was solemnly decided, after an inquiry into the meaning of § 74 of the 33 H. VIII. c. 39, which, however, is very unsatisfactory when compared with the elucidations from the bench in the English case of Giles *v.* Grover, as noticed below. In Ogilvie *v.* Wingate, 29th June, 1791, M. 7884, the Court of Session found the landlord's hypothec, (sequestration having been awarded,) preferable to the crown's right. This, in as far as it was declaration of principle, was reversed by the House of Lords, (15th June 1792,) the case being remitted, because it did not appear in what shape the crown's right stood. Professor Bell states a case in which it was found in Exchequer that an extent was preferable to the landlord's right when the goods had been sold on a sequestration, but the sale had not been reported,—the King *v.* Johnston, 29th June 1809, 2 B.C. 56. It was decided, at an early period, in England, that an extent takes precedence over the landlord's distress, not completed by sale,—the King *v.* Cotton, Parker 112. It is to be inferred, from the decisions on this matter, that no subject's tacit hypothec can compete with the crown's attachment, whether perfected by extent or other form of execution.

Competition, with other Diligence.

(118.) There is some doubt as to the order of precedence between extents and other diligences against moveables. Professor Bell says, "There seems to be little reason to doubt, 1st, That a poiding, from the moment of adjudication by the messenger, would exclude the extent; and, 2d, That, though an arrestment in execution may be supposed to exclude the crown, from the date of the execution of the arrestment being delivered, perhaps the true analogy would point out the decree of forthcoming as the only exclusion of the crown," 2 B. C. 53. But if analogy might be taken from a late case in England, Giles *v.* Grover, 1832, 9 Bing, 128, it would appear, that in the case of poiding

the crown's preference holds till the time of actual sale. The writ of *fiore facias* in England nearly represents a poinding in Scotland. It is a writ of execution, by which the sheriff takes and sells the goods of a debtor, money, and choses in action or securities for money excepted; and it was found, in the House of Lords, on consultation of the Judges, that after the goods were seized into the hands of the sheriff, but before they were sold, they might be carried by an extent. Mr. Justice Pattison thus stated the case:—"A common person brings his action against another, and obtains judgment; issues a writ of *fiore facias* upon that judgment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of the defendant. While the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same defendant, as a debtor of a debtor of the crown, tested after the seizure under the *fiore facias*, and is delivered to the said sheriff. Shall this writ of extent be executed by the sheriff, by extending the same goods, seizing them into the King's hands, and selling them to satisfy the crown's debt, without regard to the writ of *fiore facias* under which he had first seized them?" The decision, so far as it affected this branch of the case, rested on the question, whether the property had been changed by the seizure. "If by it the writ of *fiore facias* is executed, if the rights of the King and the subject no longer run together, if the property of the goods be taken out of the debtor, then the writ of extent is too late; it has nothing on which to operate. But, if the seizure of the goods be but an inception of the execution, if the rights of the King and the subject are still conflicting, if the general property of the goods still remain in the debtor, then the maxim will still apply, and the King's right must be preferred." Among many other grounds, it was argued that the risk of the goods seized is still with the debtor, that they are still redeemable at the absolute will of the debtor, on paying the debt and charges, and that the creditor can exercise no right of property in them—these criterions apply to poinding. In some measure the peculiar form of the writ of *fiore facias*, and its consummation, being the return of money, were also urged.

Some difficulty was felt in adjusting the interpretation of the 33 Hen. VIII. c. 39, § 74, which, with the other departments of law on this subject, must, as far as it is compatible with our forms, be law in Scotland. This section enacts, "That, if any suit be commenced or taken, or any process be hereafter awarded for the king, for the recovery of any of the king's debts, that then the same suit and process shall be preferred before the suit of any person or persons. And that our said sovereign lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's writ be taken and commenced, or process awarded for the said debt at the suit of our sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons." It was observed

that the giving this latter clause its more obvious interpretation, would place the crown's privilege below that of the subject litigant; for, while the latter, notwithstanding posteriority in judgment, may have priority in execution, the crown would be restricted from taking prior execution if its judgment were posterior as compared with that in favour of a subject. But, on an inquiry into the practice of the age when the act passed, it was found that the real object of this clause was to enable the subject to run a race with the crown in execution, and that it had reference to an old practice, by which the crown, without proceeding with execution itself, was able to tie up the subject creditor's hands, by a protection to the debtor. It was held, that, with reference to the point at issue, the privilege given to the subject was to proceed with his execution unmolested; and, if he could get it completed before the crown's process was sued out, he would have a preference. It was admitted that there had been not only conflicting opinions, but conflicting decisions on this point. In illustration of these, the following authorities may be consulted: *The King v. Giles*, 8 Price, 293, (of which the above was a review;) *Rorke v. Dayrell*, 4 T. R. 409. *The King v. Wells and Allnutt*, 16 East, 278. *Thurston v. Mills*, 16 East, 254. *Uppom v. Sumner*, W. Blac. 1294. *Letchmere v. Thorowgood*, 3 Mod. 236. *Lechmere v. Toplady*, 2 Ventr. 169. *Attorney-Gen. v. Andrew*, Hardr. 23. *Stringfellow v. Brownesoppe*, Dyer 67. And see *West on Extents*, 96, *et seq.*

For an examination of the question at what point a pointing is completed, which is essentially connected with this subject, see below, § 8.

(119.) *Heritable Property* is specially exempted from the operation of the prerogative writ of extent. The crown attaches such property by the ordinary process of adjudication, and ranks, by virtue of its diligence, in the same manner as a subject creditor would.

6 Anne, c. 26, § 8; 1 E. 3. 31. *Burnet v. Murray*, 5th July 1754, M. 7873.

(120.) *Revenue seizures*.—The seizures appointed by the various revenue statutes in favour of the crown, have a preference from the date of the seizure, of the same character as that which an extent has from the date of the teste. They are thus not defeasible by bankruptcy, inchoate diligence, or any other disposal of effects which does not take them out of the debtor's property.

This was solemnly decided in *Brassy v. Dawson*, 1734, 2 Str. 978, in relation to a seizure under the land-tax act, against a bankrupt collector; and the principle does not appear to have

been subsequently questioned. The privileges which the crown has here, are, that it is not prevented from proceeding by a subject having partly accomplished a diligence, and that it is not bound to impart the effects of its diligence to others, under the arrangements for putting creditors in a certain position on a par with each other. In other respects, the crown and the subject may compete with each other in a race for completion, and which-ever can first make a diligence effectual, is at leave to do so. If it be law that the teste of an extent may have precedence, coming between an adjudication and a sale in a poiding, it will follow that a seizure may be made in the same circumstances. This law must be interpreted in conjunction with those provisions in the revenue acts which preserve a preference on articles after they have left the original debtor's ownership, (see above, pp. 5, 66.) See *Stracy v. Hulse*, Doug. 412, and *Austin v. Whitehead*, 6 T.R. 436; in the former of which there was property seizable after an assignment in bankruptcy, while, in the latter, the assignment was found to bar the seizure.

SECT. 7.

ARRESTMENT.

(121.) Arrestments, whether in dependance or on liquid ground of debt, hold precedence according to the dates of their execution, where these can be distinguished, in those cases where they are not equalised by the Bankrupt Law.

Brodie v. Maclellan, 14th June, 1710, M. 816; *Roystown v. Brymer*, 31st July, 1716; M. 819; *Cameron v. Boswell*, 28th Feb. 1772; M. 821, where the appearance of a prior hour on the face of the execution was held conclusive of priority; *Goldie v. Gibson*, 26th Feb. 1779, M. 824. See M. St. ccxcii. In *Wright v. Anderson*, 28th January 1774, M. 823, the arrestments were admitted *pari passu*,—the one bearing to have been executed between the hours of five and six, and the other between the hours of five and seven.

In questions between arrestments, an edictal execution against an arrestee abroad, will hold preference according to its date over a subsequent personally executed arrestment. It was so decided in *Syme v. Anderson*, 7th Dec. 1824, 3 S. 372, in an execution at the market-cross of Edinburgh, &c.; and the same rule will apply to the edictal form substituted by 1 and 2 Vict. c. 114, § 18.

(122.) When a debtor has been made notour bankrupt, arrestments executed against his effects within sixty days prior to the bankruptcy, and four calendar months thereafter, rank *pari passu* with each other, and prefer-

ably to subsequent arrestments; and in case any arrester obtain a decree of forthcoming, and recover payment, to the prejudice of those entitled to such preference, they have action against him for a division of the funds, deducting the expense of recovering them.

54 Geo. III. c. 137, § 2. It is no objection that the summons on which an arrestment proceeds was not executed, or that the debt to be recovered by it was not liquidated at the date of the arrestment, if these and other necessary steps be taken without undue delay.

According to the method of calculating the sixty days, an arrestment, to escape from the equalization, must have been so executed that there are fifty-nine clear days between the day of its execution and that of the execution of the other arrestment. In other words, the sixty days which will clear a previous arrestment, are held as completed when the sixtieth free day has begun. *Blaikie v. Clegg*, 21st Jan. 1809, F. C.; *Anderson v. Starkey*, 2d March, 1813, F. C. These decisions were confirmed in *Scott v. Rutherford*, 9th Dec. 1839, 2 D. 206, where notour bankruptcy on 14th October, was held not to bring a poiding of 15th August within the equalizing rule. See this farther considered in relation to alienations within sixty days of bankruptcy.

(123.) *Sequestration*. Sequestration under the act of 2 and 3 Victoria, is a general arrestment of the funds of the bankrupt; and if he have been made notour bankrupt within four months anterior to the first deliverance, it will equalize all the arrestments that are either within sixty days anterior to, or are subsequent to the bankruptcy.

2 and 3 Vict. c. 41, § 83. Under the old acts there was no clause which would have justified the court in putting in execution the intention of the legislature to make sequestration, as above, equivalent to an arrestment. See *M'Geachy & Others v. Mellis*, 2d March 1808, 2 B. C. 79; *M'Ewan v. Young*, 27th May 1817, F. C.

(124.) No arrestment against the bankrupt's effects executed within sixty days before the first deliverance in a sequestration, under the 2d and 3d Vict. or during the currency of the sequestration, is effectual.

2 & 3 Vict. c. 41, § 83. For the method of estimating the sixty days, see above, and the commentary on the act 1691, below.

(125.) *Foreign Bankruptcy*.—The investment of the common debtor's estate in an assignee or other person by the bankrupt law of another country, will be preferable

to a subsequent arrestment, and, in particular, a fiat of bankruptcy in England or Ireland will give a preference from its date to the assignee, over arresters in Scotland.

See *Wilson's Assignees v. his Creditors arresters*, 31st Jan. 1755, M. 4556; *Crawford v. Brown*, 6th March 1759, M. 4559; *Thorold, &c. v. Forrest, &c.* 2d July 1762, M. 4561. In these cases considerations as to the *locus contractus* were mixed up with the genuine principle that bankruptcy effects a transference of the bankrupt's whole effects. But in *Strother v. Read*, 1st July 1803, M. *Forum Competens*, App. No. 4, the broad principle was adopted, "that by the commission of bankruptcy and legal assignment, the property of the personal effects becomes changed, and the bankrupt completely divested by a transfer, which in this country we ought to receive as complete, and to give it the same effect as we do to our own bankrupt law." In this case the assignment was pleaded as the point of preference; but in two subsequent cases, the one an American bankruptcy, the other an English, (*Maitland v. Hoffman*, 4th March 1808, and *Morison v. Watt*, same date, M. *Bankrupt*, App. No. 26,) the preference was held to exist from the issuing of the commission, so as to strike at arrestments preceding the assignment. In the case of *Crawford*, the preference was held to exist from the date of the act of bankruptcy. In the later case of *Hunter & Co. v. Palmer*, 25th Feb. 1825, 3 S. 586, this principle was reconsidered, and a contrary rule established. The question was brought on Sir Francis Romilly's clause, limiting the relation of the bankruptcy to those attachments and alienations subsequent to an act of bankruptcy, which were two months anterior to the date of the commission. The arrestments were executed within the two months, but it was decided that the court could not look farther back than the date of the commission. Lord Glenlee said, "It is no doubt an undisputed point of international law, that moveable property in Scotland, belonging to a bankrupt in England, is transferred by an English commission of bankrupt; but to give to the commission the effect which is here contended for would be more than any principle of international courts requires." The old commission is now superseded by a fiat, and no assignment is necessary to vest the estate in the assignees. From analogy, then, it is clear that the fiat supersedes all subsequent arrestments of the bankrupt's funds in Scotland; and this principle is now in conformity with English practice, in which, by recent statute, the relation of the annulling effects of the process of bankruptcy, back to the act of bankruptcy, even as curtailed by Romilly's clause, has been abolished in all cases of bona fides. By 2 & 3 Vict. c. 29, it is provided, that "all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed and levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt com-

mitted, provided the person or persons, ... at whose suit or on whose account such execution or attachment shall have issued, had not, ... at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed."

(126.) *Competition with other Individual Claims.*—An arrestment cannot carry goods possessed by virtue of a valid pledge, except as subject to the right of the pledgee.

Bridges v. Ewing, 15th Nov. 1836, 15 S. 8. Here the pledgee was dead; the articles were sealed packets of jewels, which he had left with a third party, intimating whose property they were, and the circumstance of their being pledged. The question lay between an arresting creditor of the pledger and a creditor of the pledgee, and the latter was preferred.

(127.) A right of retention or lien in the person of the arrestee existing at the time of the arrestment, is preferable to it, so that the diligence can only carry what the retention does not cover.

Brodie v. Wilson, 27th June 1837, 15 S. 1195. There is no form by which a person can arrest in his own hands, and it would be unjust that he who has the funds of the common debtor in his possession could not attach them, while a third party can. The decision was laid on the ground that the arrester can only take the right as it is in the common debtor. The common debtor was a litigant against whom expenses had been taxed, and the right of retention was for the expenses. The arrestments had been laid on before decree for expenses, and before they had been all incurred, but the right of retention was found preferable for the whole. Even when it was doubted if a right of retention was preferable to an arrestment, there could be no doubt that a right of compensation defeated arrestment. The right of lien on a commodity is illustrated in *Baillie, &c. v. Commercial Bank*, 28th Jan. 1840, 2 D. 495, where a workman employed as sub-contractor refused to give the article up to the employer of his employer unless on getting a letter from the intermediate contractor authorising payment. The letter was got, and the first employer had promised to pay the sub-contractor on its being obtained. Arrestment was executed against this first employer by creditors of the intermediate contractor, but the sub-contractor was preferred. In *Levitt v. Cleasby*, 4th Feb. 1823, 2 S. 184. efficacy was refused to an alleged factor's lien as against an arrestment, the factor not being in possession. In *Fraser v. Shepherd*, 1st July 1830, 8 S. 851, a person who had paid a crown debt for another, on the understanding that he was to have a right to furniture which it was intended to attach by writ of extent, having obtained no conveyance of the writ, or

any other title, was found to have no preference for the price of the furniture when it was sold, over arresters of the price. In *Wight's Trustees v. Allan*, 12th Dec. 1840, 3 D. 243, the agent of a trust, holder of a deposit receipt for the trust funds, was held preferable for expenses of trust management over arresters. The case of *Clyne v. Dunnet*, 27th June 1833, 11 S. 791, is one of retention of funds. A person who had come under pecuniary obligations and outlay for another, received an intimated assignation of a debt, that he might compensate himself. When part of the debt was paid arrestments were used in his hands. His own right was held preferable both on what was paid before and what was paid after the arrestments, and that to the extent of covering his outlay previous to the arrestments, and such outlay subsequent to them as was in fulfilment of previous obligations.

For considerations as to the extent to which retention and lien may respectively operate in competition, see above, pp. 24, 61.

(128.) Arrestments and assignations are preferred respectively according to their dates, viz. those of the execution of the former, and of the intimation of the latter.

Monypenny v. Rose, 11th July 1835, 13 S. 1112, where assignations and arrestments of an alimentary fund, so far as for alimentary debts, were preferred according to their dates. See *Waddell, &c. v. Smith, &c.* 26th Nov. 1836, 15 S. 151. Stair says, (4. 35. 6.) that when both occur on the same day, unless three hours intervene, they must stand *pari passu*; and this was acted on in *Douglas v. Mason*, 29th June 1796, M. 16213; but where the difference of time is clear on the face of the transactions, it would probably serve to effect a precedence, however short it might be.

A nullity in the assignation will leave the subject of it open to arrestment, as in the case of *Isles v. Gill, &c.* 23d June 1836, 14 S. 996, where a document to the effect, "Sir,—Pay the bearer the sum of £40 sterling, and charge the same against my account of wright work for your house," on unstamped paper, was held to be a bill null without stamp, and so ineffectual to preclude an arrestment.

An unintimated assignation cannot preclude arrestment. In *Strachan v. M'Dougle*, 19th June 1835, 13 S. 954, a policy of assurance on the cedent's life was assigned, and along with a letter of assignation deposited with the assignee, but was not intimated, and an arrestment during the cedent's life was preferred. The case of *Levitt v. Cleasby*, 4th Feb. 1823, 2 S. 184, elsewhere referred to, was one in which the want of intimation made the transfer to the factor insufficient to obviate arrestment.

(129.) A law agent has no preference through his hy-

pothec over an arrester of the fund judicially awarded to his client, when it is unpaid.

Stephen v. Smith, 1st June 1830, 8 S. 847. It was observed that the agent's security lay in his being entitled to take the decree in his own name. This was a question as to a submission, but to bring out the point it was taken for granted that the agent had the same privilege as he would have had in a judicial litigation.

(130.) *Executor Creditor*.—In competition with a confirmation as executor creditor, an arrestment executed during the lifetime of the deceased gives no preference, unless decree of forthcoming has preceded the confirmation.

Carmichael v. Mosman, 22d June 1742, M. 2791; *Wilson, &c. v. Fleming*, 26th June 1823, 2 S. 430. See the ranking on the estate of a deceased person, Chap. IV.

(131.) The handing over of money to an intermediate party, with instructions to pay the common debtor, will defeat an arrestment, if the arrestee was out of the way at the time of the execution and subsequently, and so unable to alter the destination of the money.

Laidlaw v. Smith, 25th Jan. 1838, 16 S. 367. On the 14th May, the holder of the money in Glasgow handed it over to his agents there, with instructions to them to discharge the common debtor's claims with it in such manner as they should think proper. The arrestment was executed two days before the money was paid to the common debtor, the arrestee having in the meantime left Glasgow, without leaving any instructions regarding the transmission of papers or messages. It was not simply on bona fides that this decision was given, for an arrestee is bound by a properly executed arrestment, though he is not aware of its existence. (3 E. 6. 14.) The arrestee had, in fact, disposed of the subject before the arrestment was executed, and any question as to bona fides must have arisen out of his responsibility to endeavour to undo what he had done, in the event of his afterwards being made aware of the execution of an arrestment. But it is difficult to draw a clear line between those cases where the money is paid away in this recoverable manner, and those where the arrestee's defence is that he was ignorant of the arrestment. The Lord Ordinary (Moncreiff,) in the case just cited, thus stated a set of instances in which he thought the payment would be preferable to the arrestment, "A merchant leaves his dwelling-house in the morning, and, at his counting house, pays a debt at twelve or one o'clock, and it turns out that, unknown to him, an execution of arrestment had been left at his house soon after he had

quitted it. A farmer leaves his house to attend a market at a distance, meets with his creditor, and pays the debt; and finds, on returning home, that an arrestment had been used before he made the payment. A trader empowers his traveller to pay a debt to a creditor at a distance, and the instruction is obeyed; while, in the meantime, an arrestment had been laid at the trader's domicile." In the case of arrestment edictally executed, payment by the arrestee in ignorance of the execution, is validated by statute. The 54 G. III. c. 137, § 3, renders the payment effectual, unless it be proved that he, "or those having authority to act for him," were previously aware of the execution.

SECT. 8.

POINDING.

This diligence, being an attachment of effects in the possession of the debtor, does not afford so many occasions for competition with other titles, as arrestment, which affects property in the custody of another; and the main questions as to priority of right occur in competitions among poinders themselves. With regard to other diligence, a competition with the landlord's sequestration for rent is cut off by the hypothec, which protects the effects from diligence by the subject, (see above, p. 69.) It has to be kept in view, however, that while the rent is current, the hypothec, not being convertible into a real pledge by sequestration, is held to cover the whole subjects affectable by it, while, after the rent becomes due, it affects only so much as may be sufficient to insure payment of the rent. See *Pringle v. Scot*, 28th June 1736, M. 6216, 2 E. 6. 59. The effect of poinding in competition with the crown's execution is considered above, p. 93, and the relation of personal poinding to poinding of the ground is briefly considered in the present section.

(132.) *Pari passu Preference*.—When a debtor has been made notour bankrupt, all poindings of his effects, within sixty days prior to the bankruptcy, and four calendar months thereafter, rank *pari passu* with each other, and preferably to subsequent poindings; and any creditor having liquidated grounds of debt or decree for payment, who, within the four months, summons the poinder or judicially produces his grounds or decree in any process or competition, relative to the poinded goods or their price, is entitled to his proportion, deducting the expense of the poinding, for which the poinder has a preference.

54 G. III. c. 137, § 5. As to the method of calculating the sixty days, see above, p. 97, in relation to arrestments. By 1 & 2

Vict. c. 114, § 23, an officer poinding must, if required, conjoin in the poinding "any creditor of the debtor who shall exhibit and deliver to him a warrant to poind." It has been decided that the status of bankruptcy once established subsists until solvency returns, and that after the lapse of four months from the bankruptcy, a second bankruptcy will not equalize the diligences according to the statute, unless there has been an intervening restoration to solvency. *Strang v. M'Intosh*, 12th May 1821, 1 S. 5.

(133.) If the goods poinded are sold, not in virtue of the poinding, but on some distinct authority, the poinding is held to be abandoned, and the equalization rule will not apply.

M'Farlane v. Greig, 2d March 1831, 9 S. 529. This case opens but does not settle the difficult question, what preconcerted departure from the statutory routine will take the proceedings out of the equalization rule. It was held that the sale, instead of being in virtue of the poinding, was by authority of the owner of the effects; yet the person for whose apparent behoof they were sold, conducted the proceedings, and profited by his departure from the statutory rules. In general, such a transaction will resolve itself into a fraudulent preference to particular creditors struck at by the act 1696.

(134.) *Possession Transferred*.—Effects of which the possession is transferred, in virtue of a trust-deed for behoof of creditors, or other valid conveyance, cannot be attached by poinding.

Henry v. Robertson, &c. 14th May 1822, 1 S. 398. *Wyld, &c. v. Hannah, &c.* 8th Feb. 1828, 6 S. 510. Here trustees had taken possession of a shop and the tradesman's books. The shop was shut, and the poinding had been executed on letters of open doors. Interdict was granted against a sale in virtue of the poinding. See *Walker v. Irvin & Co.* 4th June 1841, 3 D. 985. But see below, Book II. Chap. II. § 6.

(135.) *When Completed*.—It is held that the process of poinding is not a complete transference of the effects of the debtor, such as will preclude any other title by which they may lawfully be transferred, until the sale is completed, and a note of it lodged with the sheriff clerk.

Tullis v. Whyte's Trustees, 18th June, 1817, F. C. where, after warrant of sale was granted, a poinding of the ground on a *debitum fundi* was found competent to attach the effects. In *Samson v. M'Cubbin*, 15th May 1822, 1 S. 406, the court ex-

pressed an unanimous opinion "that the property of pointed goods is not transferred till after the sale has been completed in terms of the statute." See also *Scoullar v. Campbell & Co.* 27th May 1824, 3 S. 77, and remarks from the bench in *Lyle v. Greig*, 27th June 1827, 5 S. 845. The above principle having been embodied in a decision, and in the dicta of the bench, there is no alternative but to state it as the law. Professor Bell, however, both in his *Commentaries*, (2 B. C. 64,) and in his supplementary work on the recent statutes, (p. 20,) thinks the law should be otherwise. He says, "If, then, a question like that of *Tullis* were to arise now, would it be decided in the same way? I contend that it ought not, but that the pointing and real right of the creditor ought to be held as completely vested at the moment of the messenger's adjudication, and that it could be defeated only on *mora* or undue delay." In support of this view, he refers to the terms of the expired act of sederunt, 14th Dec. 1805, which, after directing the lodging of the minute of sale, says, "which steps being duly taken, the pointing shall be held as complete, and the property transferred as of the date of the execution of pointing; but if any of them are omitted, or not taken at the time and in the manner before specified, the diligence shall only be considered as inchoate and not as complete, till the minute of sale or delivery is lodged in the hands of the clerk of court, and marked by him." It does not follow from this, that before the lodging of the minute the property is to be considered as transferred, any more than in a sequestration the estate is vested by the first deliverance, and before sequestration is awarded. The expression would seem to imply that the transference never does take place until the lodging of the minute, but that when that takes place the date of the transference is by retrospect that of the execution, as in the case of sequestration the date of the vesting is that of the first deliverance. If this be the case, the lodging of the minute, and the consequent retrospective transference, will depend on the effects not having been in the meantime transferred by some effectual process. The competition of the crown's extent with the diligence of pointing will be found farther considered above, p. 93. It seems likely that the question whether the extent will carry the effects between adjudication and sale, will depend on the settlement of this point.

(136.) *Sequestration* under the 2 & 3 Victoria is equivalent to "an executed or completed pointing," and if the debtor have been made notour bankrupt within four months anterior to the first deliverance, it will produce the equalizing effect above set forth.

2 & 3 Vict. c. 41, § 83.

(137.) No pointing of the bankrupt's effects executed

within sixty days before the first deliverance in a sequestration, under the 2 & 3 Victoria, or during the currency of the sequestration, is effectual.

2 & 3 Vict. c. 41, § 83.

(138.) *Effects of Delay.* It is a generally admitted principle, that delay in proceeding with the poinding, carrying any of the operations beyond the period statutorily assigned to them, in conformity with the principles of the Act of Sederunt, strips the proceedings of their preferable quality. By the late act the officer must report the execution to the sheriff within eight days, "unless cause shall be shown why the same could not be done within the period of eight days." 1st & 2d Vict. c. 114, § 25. By the old act he was only "forthwith to report." 54th Geo. III. c. 137, § 4. There is no time fixed within which the sheriff's warrant to sell must issue; but he directs public notice to be made of the sale, and the sale "shall not take place sooner than eight days, nor at a longer period than twenty days after the date of the publication of the said notice." 1st & 2d Vict. c. 114, § 26. In two cases under the old act, it was found, that the lapse of not less than eight or more than twenty days was to be between the warrant and its publication. *Carmichael v. Johnstone*, 10th Feb. 1821, F. C.; *Thom v. Stuart*, 21st Dec. 1842, 5 D. 369.

Poinding the Ground, in Competition with Personal Poinding.

(139.) This process, for the purpose of effecting in favour of a creditor on a *debitum fundi*, a right which seems to have partaken of the nature of a hypothec over the moveables on the lands comprehended within his infeftment, is not capable of being communicated, like personal poinding, to the effect of establishing a *pari passu* preference. How far it may be defeated by a previous execution, before sale, of personal poinding of the effects on the ground, is, as above, a disputed question. In the case of *Whyte*, the real creditor was found entitled to pursue his poinding notwithstanding the previous execution, and if that case were undisputed it would fix the law. On the other hand, the Court of Session and the House of Lords have solemnly decided against one principle supposed to be involved in that case—that, independently of execution, the creditor in a *debitum fundi* holds by modern practice a hypothec which follows the effects and defeats any attaching process against them. In *French v. Marshall*, 22d March 1826, 2 W. S. 71, one of the creditors of a sequestrated estate was a preferable creditor on an heritable bond. The heritage was insufficient to satisfy his preferences, and without having poinded the ground, he claimed a preference over the

moveables on the lands covered by his security. He was found to have no such tacit preference. In the older case of *Parkers v. Douglas, Heron, & Co.* 5th Feb. 1783, M. 2868, the preference seems to have been admitted.

CHAPTER IV.

RANKING ON THE ESTATE OF A DECEASED PERSON.

SECT. I. THE EXECUTRY.

(140.) *Six Months' Preference.*—Creditors are restricted from either confirming themselves as executor-creditor to their deceased debtor, or from extracting decree against an executor, until the lapse of six months from the date of the debtor's death. All the creditors who use diligence against the executor within the six months, come in *pari passu* with those who have decrees ready to extract.

A. S. 28th Feb. 1662. 3 E. 9. 45. It is held, that to allow creditors to obtain constitution of their debt in time to participate in the fund, the court would give equitable facilities corresponding to those afforded for the purpose of enabling adjudications to be conjoined within year and day, as described p. 84, *et seq.* (see 2 B. C. 87,) but the subject has not yet been illustrated by decisions.

(141.) *Privileged Debts.*—Creditors of privileged debts are not subject to the equalization rule, and the executor may pay them in full at any time.

3 E. 9. 43. 45. For an account of the Privileged Debts, see above, Chap. I.

(142.) *After the Expiry of the Six Months,* the creditor may pay to the first comer; but while the funds are undivided, every creditor who cites the executor is entitled to a share, although the six months should have expired before the citation.

The executor's right to pay *primo venienti* after the six months, on a responsibility only for the verity of the debt, and not for the adequacy of the funds to meet all the debts, was decided in

Gardner, &c. v. Pearson, &c. 28th Nov. 1810, M. Syn. 485 ; see also Cathcart v. Moodie, 17th Feb. 1804, M. *Heir & Executor*, App. No. 2. The other branch of the proposition was decided in Russell v. Simes, 1791, Bell's Cases, 217, and 2 B. C. 88 ; see also Græme v. Murray, 15th Feb. 1738, M. 3141, and Creichen's creditors, 13th Feb. 1742, M. 3141. The funds seem, in Russell's case, to have been completely undistributed—it may be a question how far, in the case of their having been partially exhausted, there might be a claim for an equal distribution of the remainder among creditors claiming after the six months. It will be observed that the principle of this equal distribution is radically different from that of the *pari passu* preferences in bankruptcy, which completely exclude creditors not conducting their proceedings within the limited time, from any participation, unless in a surplus. The object of the equalization in this instance is not so much that of bringing all the claims together within a limited time, as to prevent any from being paid before the creditors in general have the means of knowing of the death, and of the quarter through which they are likely to obtain payment. In conformity with this purpose, it is held that priority of decree, after the six months, gives no preference, and that a citation places the executor in *mala fides* if he overlook the citing creditor.

Competition with incompletd Diligence.

(143.) The question, how far diligence commenced but not concluded during a debtor's lifetime, will establish an exclusive preference in favour of the holder, enabling him to make it effectual against the executry after death, depends on the question whether it has proceeded to the extent of a completed transfer before the death. There can be no doubt that an extent of which the teste is dated before death, is a complete transfer of the goods, excluding competition.

Professor Bell says, " Poinding of the ground, executed before death, will affect the moveables on the ground after the proprietor's death," (2 B. C. 83.) This doctrine seems to rest on the principle that the poinding is a process, not against the debtor personally, but against the estate. Professor Bell continues, " Personal poinding, if executed before the debtor's death, will be effectual to ground an order of sale and payment after ; " but, in the authority to which he refers in support of this doctrine, Morton v. Somerville, 20th June 1765, M. 6197, the decision was, that a poinding executed by the second appraisement being completed during the debtor's lifetime, gave no preference to the pointer on his decease. The poinding was of growing crops, which, it was said, were incapable of any but an elusory appraisement. The report says, " This interlocutor proceeded entirely on the footing that the poinding was only inchoated in June, and that it could not be completed after the death of the common

debtor." But this statement leaves it uncertain whether the second appraisement, of which, in modern practice, the officer's execution is nearest to being an equivalent, was, in all cases, inchoate and insufficient to warrant a sale after the debtor's death, or was only inchoate in that particular case, owing to the poiding having been of a growing crop, and the proceedings being taken in the month of June. As to Professor Bell's opinions on the point at which a poiding is complete, see above, p. 104. He proceeds to say, that "an arrestment, of which the execution is dated before the debtor's death, will ground a decree of forthcoming after." The authority referred to is *Aberdeen v. Scot's creditors*, 22d Dec. 1738, M. 774; but, in this case, it was not the common debtor who had died, but the arrestee. It would certainly be more in conformity with the analogy of other cases that the attachment created by the arrestment should subsist, notwithstanding the common debtor's death, than that it should be preferable over an arrestment in the hands of the arrestee's executor. In an older case, *Riddel v. Maxwell*, 20th Jan. 1681, M. 783, it was found that a forthcoming might proceed on an arrestment notwithstanding the common debtor's decease. The same seems to have been found in *Wemyss v. May*, 16th Jan. 1679, M. 782; and *Hume v. Hay*, Feb. 1688, M. 2790. It has been decided that a confirmation as executor-creditor is a mid-impediment to a forthcoming. *Wilson v. Fleming*, 26th June 1823, 2 S. 430. See par. 129.

(144.) *Personal Rights of Executor, Nominate and Dative*.—If a creditor be confirmed as executor, either nominate or dative, he is in the position of having done diligence for himself, and is entitled to the *pari passu* preference with those doing diligence within the six months; and if not cited or otherwise interpellated by legal diligence during the six months, he may, on their expiry, pay himself by retention.

Napier v. Menzies, 19th Dec. 1740, M. 3849. The doctrine was fully confirmed in *Macleod v. Wilson*, 30th May 1837, 15 S. 1043. In *M'Dowal's creditors v. M'Dowal*, 21st Dec. 1744, M. 10007, it was held that the executor might retain funds to meet his contingent liabilities as a cautioner.

(145.) *Privileges of Executor-Creditor*.—A confirmation as executor-creditor is not the assumption of a trust for other creditors, but is the individual creditor's own diligence, covering the sum for which he confirms, and liable to the claim of any other creditor who cannot find other funds to attach, to be conjoined in it.

Lee v. Donald, 17th May 1816, F. C. The executor-creditor

having confirmed to the extent of a certain dividend due to the deceased, had intromitted with subsequent dividends, and was found liable to account for what was so overdrawn to a person confirming as executor-creditor *ad omissa*. It was found in the same case that the first executor-creditor was not entitled to an eik after the application for confirmation *ad omissa*. In *Gibbon v. Johnston*, 3d July 1787, H. 276, it was found that a person claiming to be conjoined in a confirmation as executor-creditor, must have a liquid or constituted debt. After the expiry of the six months allowed for the operation of the *pari passu* preference of the creditors of the deceased, it would appear that an executor-creditor is not bound on the citation of another creditor to communicate a share of the executry.

(146.) A decerniture as executor-creditor operates no preference until confirmation, and after the expiry of the six months from the debtor's death an unconfirmed executor-creditor cannot exclude other creditors from being conjoined with him.

Willison v. Dewar, 17th Dec. 1840, 3 D. 273. The delay in this case arose from the refusal of a person conjoined in the decree as executor-creditor to concur in the confirmation. It was thought that the confirmation could not proceed without the concurrence of both the executor-creditors. The alleged reason for the party not giving concurrence was, that there were other claimants; and an opinion was expressed to the effect that, in the case of any party obtaining decerniture as executor-creditor, no other party can be conjoined otherwise than by the decerniture being recalled and rescinded, and a new decerniture issuing, in which the parties are conjoined.

(147.) *Preference of Defunct's Creditors during Year and Day*.—If the creditors of an unconfirmed nearest of kin proceed to attach the estate by getting themselves confirmed executor-dative or otherwise, the creditors of the defunct doing diligence within year and day of his decease, are preferable to such creditors of the nearest of kin.

1695, c. 41. The preference is created by the statute when the question is between the creditors of the unconfirmed executor and those of the ancestor, each set of creditors doing the diligence competent to their respective situations. Against an executor confirmed it is held that there is always a preference for the ancestor's debts so long as there is a distinguishable estate of the ancestor's which can be attached. As in *Tait v. Kay*, 12th Feb. 1779, M. 3142, where it was in the hands of a third party, and arrested; and *Christie v. Allan's creditors*, 27th June 1835, 13 S.

998, where the executor was confirmed, and a multipointing was found competent for the distribution of so much of the deceased's separate estate as could be distinguished. Professor Bell says, that the preference "will subsist even after expiration of the year, in whatever way the executry has been taken up, provided the fund can be clearly identified." (2 B. C. 90.)

SECT. 2.

HERITAGE.

(148.) *Year's Preference of Ancestor's Creditors against Alienations.*—The claims of the creditors of a deceased person against the heritable property, cannot be defeated by any alienation of, or other deed affecting it, by the heir, within one year after the ancestor's decease; and any such deed by the heir is reducible at the instance of a creditor of the deceased.

1661, c. 24. The proceeding is reducible at the instance of the creditor, though it should be a sale or other onerous transaction. *Taylor v. Braco*, 26th Nov. 1747, M. 3128; *Magistrates of Ayr v. Macadam*, 14th June 1780, M. 3135. It is held, however, that in the case of a sale for a just price, if the price be recovered by the creditors, the sale is irreducible, (1 B. C. 735.) It is not necessary, as in the case of the preference within the three years, that the creditor should have completed diligence—he enjoys an inherent right of reduction, which exists during the period of the long prescription, (same cases.) In the *Ayr* case it was found that though the phraseology of the act is, "appear and heirs," its operation is not limited to those who are unentered. A deed will not be reducible under the act, by any person other than a creditor of the ancestor. As no quality but that of being creditor is necessary to constitute the title to reduce, it does not appear that those who fail to complete diligence within the three years lose the privilege. Nice questions, however, arise, as to how far the benefit of its exercise extends. The privilege is likened to an inhibition, which can be used to the benefit only of the person holding right to it, and thus it is presumed that in so far as it might throw open the estate to distribution among the creditors of the heir to whom the privilege is not given, it cannot be used, (1 B. C. 736.) If this be the character of the privilege, it is to be presumed that, by acting on it, the ancestor's creditor may obtain, to the extent of the reduction, a preference over the heir's creditors after the expiry of the three years.

It was found in *Ballenden v. Murray*, March 1685, M. 3127, that a disposition by the heir in favour of the ancestor's creditors was not reducible under the act. The capacity of the person claiming the right of reduction in this case is not stated.

Erskine leaves it to be inferred as his opinion, that one creditor of the ancestor cannot reduce a preference granted to another. He says, (3. 8. 102.) the act “does not bar from disposing, even within the year, any part of the ancestor’s estate to a creditor of that ancestor.” But there is now little doubt that any creditor of the deceased, showing that he is injured by the deed, has the right of reduction. An opinion to this effect was given by a majority of the judges in *Christie v. Royal Bank*, 17th May 1839, 1 D. 745, where the decision rested on the circumstance that the creditor preferred was in law the creditor of the heir. Erskine’s authority for the opinion above expressed is to be found minutely examined in the opinions of the judges, and as expressed by Lord Corehouse:—“The result of this inquiry is, that the only judgment on which Erskine founded does not touch the present question at all; and that the other judgments in the cause decide, not indeed in express terms, but by plain and necessary implication, that a disposition in favour of one of the ancestor’s creditors within the year is unavailing in a question with his other creditors.”

(149.) *Three Years’ Preference of Ancestor’s Creditors in Diligence.*—The creditors of an ancestor have a preference over those of an heir on the heritable estate, if their diligence be effected within three years from the time of the ancestor’s death.

1661, c. 24. The terms of the act are, “the appearand heir;” but by its interpretation in practice, it has been extended to heirs whether entered or unentered, (1 B. C. 730,) *Bennet v. M’Lachlan*, 15th June 1829, 3 W. S. 449; and the subsequent phraseology of the act shows that to have been the intention of the legislature. It was held to include nominatim substitutes, over whose creditors those of the institute were held preferable. *Graham v. M’Queen*, 9th Feb. 1711, M. 3128. It would appear that the act extends to heritable rights of every description. In *Mackay v. Mackay’s representatives*, 15th Feb. 1783, M. 3137, a bond heritable *destinations* was found within it; and the court “were clearly of opinion that the statute applies to heritable bonds indiscriminately, whether they be such *destinations* or *sua natura*.” Lord Kames had endeavoured to show that the act applied to moveable as well as heritable property, but this view has been refuted. 3 E. 8. 102. 1 B. C. 730. *Ker v. Scots*, 17th June 1712, M. 699. It is held that to entitle diligence to the privilege, it must not only be commenced, but completed, so that in rights requiring infestment there must be infestment or a charge to a superior. 2 St. 12. 29. 3 E. 8. 101. In *Ballenden v. Murray*, March 1685, M. 3127, a decree *cognitionis causæ*, within the three years, was found insufficient to establish the preference, and it was observed, “That the defunct’s creditors

ought to do exact and complete diligence against his estate within three years after his death, unless they could make appear that their diligence was retarded without any fault of theirs, by opposition from the heir or other creditors, or the surcease of justice or the like." The exceptions thus laid down are applicable to the judicial operations of an age long past, and it would not be consistent with the principles of existing practice to allow either of them to be pleaded to the effect of placing a person who has not accomplished that which the law requires in the same position as if he had accomplished it. If it be law that the diligence must be completed, its incompleteness must be fatal to it, from whatever cause arising. It is true that in *Bennet v. M'Lachlan*, 15th June 1829, 3 W. S. 449, among the pleas which were separated from the grounds of the final decision in the Inner-house and the House of Lords, was, that the non-completion of some of the adjudications by charges to superiors was attributable to opposition by the trustee for the heir's creditors, and Lord Eldin gave effect to the plea in the Outer-house. But it is probable that the equitable aid which a creditor of the ancestor will obtain from the courts will be, not in holding that to be done which is not done, but in aiding the completion of the diligence by dispensing with formalities. Thus, in *Cowan & Others, Petitioners*, 27th Nov. 1832, 11 S. 130, the court dispensed with the induciæ in the adjudication, but refused to dispense with the usual intimation in the minute-book. In adjudging in such a case the statutory requisites as to intimation will have to be executed in the case of a first adjudication, (see p. 81.)

(150.) *Effect of Sequestration.*—The general adjudication embodied in a sequestration operates as a completed diligence to secure the preference of the creditors of the ancestor during the three years, without any proceedings on their part.

Bennet v. M'Lachlan, 15th June 1826, 4 S. 712. Confirmed on appeal, as above. Some diligences had been completed within the three years, others had not. It was contended that the trustee held for all creditors, whether of the ancestor or heir, according to the title they could produce, and that, while he preferred those who had completed diligence during the three years, he was not to prefer those whose diligence was uncompleted. The trustee urged, that it should be found in the Court of Session, as a legitimate conclusion from the decision, that the diligences led after the sequestration were illegal and incompetent, but the court found that there was no occasion to decide this point.

A first deliverance in a sequestration of the heir's estate, if sequestration be afterwards pronounced, will thus, if coming within the three years, secure the preference of the ancestor's creditors. As by statute a judicial sale is declared to be equivalent

to adjudication for all concerned, as at the date of the first deliverance, (54 G. III. c. 137, § 10,) it seems beyond doubt that the deliverance in that case effectuates the preference of the ancestor's creditors in the same manner.

(151.) *Inhibition* is not a diligence within the act, which, if used within the three years, will give a preference over those creditors of the heir whose debts were contracted prior to the inhibition.

Menzies v. Murdoch & Others, 15th Dec. 1841, 4 D. 257. It was pleaded that the opposition to the inhibitor's constitution of his debt precluded his doing more complete diligence; but it was held, that he might have taken advantage of the judicial facilities afforded in such cases, and obtained decree, reserving objections *contra executionem*.

SECT. 3.

DISTRIBUTION UNDER SEQUESTRATION ACT.

(152.) The estate of a deceased person may be collected and distributed under the sequestration act, whether he was or was not within the class of persons whose estates may be sequestrated during their lifetime, and whether he was or was not bankrupt, if at the time of his death he resided or had a dwelling-house, or carried on business in Scotland, and owned heritable or moveable property in Scotland.

2 & 3 Vict. c. 41, § 4. For further elucidation of this, see below, Book IV.

BOOK II.

INSOLVENCY, AND ITS EFFECTS ON PROPERTY AND TRANSACTIONS.

Insolvency in Scotland is not a status fixed by any public legal criterion, like notour bankruptcy, but a matter depending on the circumstances of each individual case, and incapable of a general definition applicable to all the classes of instances in which the question of its existence may arise. The merchant who allows his bills to be protested, and who stops payment during a pecuniary panic, is insolvent in relation to questions of stoppage in transitu, and the like, although he may be the holder of securities and other inconvertible property sufficient, if it could be converted into cash, to meet all demands on him. The same person, at a time when his obligations far exceed his property in any shape, supported by accommodation bills and other aids to fictitious credit, although he has not stopped payment, or given any other intimation which will warrant those who have transactions with him in treating him as insolvent, will yet be considered so in questions as to the reduction of gratuitous alienations under the act 1621. In these circumstances no general definition of insolvency is attempted, and the elements of which it is constituted in various cases, are left to be described in connexion with the several classes of transactions which may be affected by insolvency. It may be remarked, that as in England a bankrupt means a person whose estate is subjected to realization and distribution under the mercantile bankruptcy system; so an insolvent means strictly a person who, either at his own instance or that of his creditors, is undergoing the process of inquiry and distribution authorized by the insolvent debtors' act.

CHAPTER I.

RIGHTS OF CREDITORS AGAINST ALIENATIONS
INDEPENDENTLY OF STATUTE.

SECT. I. GRATUITOUS AND LATENT DEEDS IN GENERAL.

(153.) *Gratuitous Deeds*.—It is a general principle of the law of Scotland, that the rights of onerous creditors are not to be defeated by the gratuitous deeds of their debtors.

1 St. 9. 12. 4 E. 1. 44. *Roseberry v. M'Queen*, 1st July 1823, 2 S. 443. The doctrine is founded on the civil law,—see § ff *Quæ in fraudem*. The practical operation of this principle is deducible from a series of decisions, which have had for their end the protection of creditors against such fraudulent conveyances as do not come specially within the operation of the act for the reduction of gratuitous deeds.

(154.) *Latent Deeds* to near relations, to the injury of creditors, are reducible on the ground of fraud, and the creditors in such a case are not bound to prove that the granter was insolvent when he granted the deed.

Marshall's creditors v. Hamilton, 23d Dec. 1709, M. 48ⁿ; *Simpson v. Finlay*, 16th Nov. 1697, M. 11570; *Creditors of Pollock v. Pollock*, 21st Jan. 1669, M. 4909.

(155.) An undelivered deed in the hands of the granter unregistered, is in this respect a latent deed.

Bathgate v. Cochran, 2d Dec. 1685, M. 11569; *Creditors of Robertson against his Children*, 10th Feb. 1688, M. 4929.

(156.) *Registration*.—The registration for publication of a deed which might otherwise be open to challenge, will be in the general case a protection against a charge of collusion; but it is not a fixed principle, that by registration a deed is taken out of the latency.

In *Roseberry v. M'Queen*, 1st July 1823, 2 S. 443, a party conveyed to trustees for his wife and children, burdened with an annuity to himself. He remained in possession. The sasine was recorded before the obligations to the impugning creditor were contracted, yet the deed being obviously a fraud on creditors was reduced. Here the possession and other circumstances counter-vailed the presumption from registration. The other cases, how-

ever, which convey a doubt of the efficacy of the register to remove the latency are all of an old date, when registers were irregularly kept. In the case of *Street v. Mason*, 27th Feb. 1672, M. 4911, which was one of clear fraud, a registered sasine to the disponent's child was reduced by a posterior disponent, the disponent's mercantile correspondent in London, who pleaded, "that he was a stranger, and could not in the continuance of a trade be always searching registers." The debts arose in the course of trade, subsequently to the sasine. In the case of *Reid v. Reid*, 9th Jan. 1673, M. 4923, a sasine was produced, "marked as registrat," in the county register. "The lords found, that seeing the sasine produced referred to no leaf in the register, that the marking thereof did not take away the fraud and latency, unless the defender would instruct that there was a register book, wherein this sasine was registered before contracting of the debts in question; or that the creditors, before they lent their money, knew that the son was infest." On the principle of these cases, latency is a question of circumstances, and it would not be in disconformity with their spirit to infer it from the registration of a sasine in the general, in place of the local register. In the case of *Leckie v. Leckies*, 22d Nov. 1776, M. 11581, it was found in a question of competing settlements, that registration was delivery where the deed related to heritage, but not where it related to moveables. See below, the difference between questions with creditors and questions of succession.

What is sufficient Delivery in questions with Creditors.

(157.) In following out the spirit of the law for the protection of creditors, it would seem that a distinction should be drawn between what is good delivery in a question with the granter and his representatives, and what is sufficient delivery to carry the subject beyond the claims of creditors. Cases may easily be supposed in which it should be the policy of the law to hold delivery in the former sense complete, in circumstances in which creditors, though posterior, should have the right to reduce, on the ground of latency. It does not appear, however, that the distinction has been kept in view in the decisions, unless in the case of that constructive delivery which is said to take place when deeds in favour of children *in familia* are preserved in the custody of their parents. In this case, the delivery may be effectual to convey the subject in a question with representatives, while it will be reducible by creditors on the ground of latency. It is difficult to find in the decisions which, in connexion with this subject, are chiefly of an old date, any thing which would enable a writer to lay down a set of clear satisfactory principles on this subject. The point of doubt is, whether such deeds as above described in the parents' custody, and granted by the parents themselves, are to be considered as, to any intent, *delivered* deeds. In the case of *Glen-corse v. his Brethren and Sisters*, 9th Jan. 1668, M. 16995, the

parent's custody seems not to have been held, in any sense, as delivery; but it would appear that in that case the children were forisfamiliated. There is one case, (*Creditors of Pollock v. Pollock*, 21st Jan. 1669, M. 4909,) in which it was solemnly decided, that obligations by parents, in favour of their children, lying in the parent's depositories, should be effectual against representatives, but not against subsequent creditors. It is difficult to see on what principle this case was decided, other than that of a completed transfer having been made by virtual delivery; for the obligation was not of a testamentary character, nor was it maintained to be so in the pleadings on either side. The Lords found, "That if such bonds were sustained, it would open a door to all fraud, and the undoing of all trade and commerce; and therefore preferred lawful creditors; but likewise found, that the son upon this bond was preferable to the relict and bairns of the second marriage, as to what they might crave *jure relictii*, or bairn's part of gear, but not in so far as they were creditors by the contract of marriage; and the Lords ordained this to be inserted in the Books of Sederunt, to be a leading cause in all time coming." "Bonds and other writings," says Erskine, (3. 2. 44.) "in favour of children, need no delivery; because parents have, by a natural right, the custody of their children's writings." It seems the simplest method of viewing the position of such writings, to consider them as delivered from their date, subject to a power of revocation. In this position, when they affect the rights of creditors, they are subject to reduction, not as undelivered, but as latent deeds. In some of the pleadings, reference has been had to the fiction that the granter, by incurring debt, must be held to have revoked his deed, (see *Inglis v. Boswell*, 14th Nov. 1676, M. 11567;) a fiction not necessary to carry out the spirit of the law, and so adverse to the general state of the fact, that the very reason of granting the deed has usually been for the purpose of saving part of the granter's estate to his family, in the event of his falling into embarrassed circumstances. The spirit of the law is, that unless by a deed registered for publication, a man cannot transfer property from himself to a child living *in familia*, to the detriment of his creditors, prior or posterior. Delivery, not presumed but actual, would otherwise be necessary for the transfer, and such delivery the father cannot make; for the law presumes him to be the custodian of all the writings under his roof. Nor, on the other hand, does it seem that delivery to a third party is effectual to defeat the claims of the creditors, as was found in a case where the father had deposited a deed with his own uncle, *Holwell v. Cuming*, 31st May, 1796, M. 11583; see also *Stuart v. Robertson's Bairns*, 10th Feb. 1688, M. 969. It is usual to speak of the parent's right of revoking the deed, as a right exercisable precisely in the same circumstances with the creditor's right to reduce. There do not seem to be any cases in which a distinction has been taken between the two. There is, it is true, one old case, of which the circumstances have not been detailed

with sufficient fulness to make it a satisfactory precedent, in which it was found that an admittedly gratuitous obligation, granted by a father to his son *in familia*, and deposited with a third party, was irrevocable, *Allan v. Allan*, 25th Nov. 1681, 2 B. S. 7, 3 B. S. 413. According to the doctrine derived from the other decisions here quoted, it would seem that such delivery would not protect a gratuitous deed from subsequent creditors. In *Fairlie v. Fairlie*, 11th June, 1630, M. 11567, an assignation by a mother to her son, deposited with the son's father-in-law, was found irrevocable; and the same was found in *Sinclair v. Purves*, 26th June, 1707, M. 11572, in the case of a deposit with a third party, for the security of the parent's liferent, which was reserved. In both of these cases, however, the children were forisfamiliarated. There are two other cases which may be consulted as bearing on this point, but in which the facts are not so fully stated that a principle can be satisfactorily derived from them, *Paul v. Davidson*, 29th Feb. 1694, M. 4929, and *Robertson's Creditors v. his Children*, 10th Feb. 1688, M. 4929.

A case was decided on appeal in 1829, (5th June, *Malcolms v. Young*, 3 W. and S. 404,) which might have given ground for some nice distinctions, had it been fully argued. There was an assignation of house property by a father to his sons *in familia*. It was recorded only in the sheriff-court books. The sons received the rents. The decision seems to have depended on the circumstance that, while they were men upwards of forty years old, the father was superannuated; so that he did not act as the head of the family. In a question between the sons and the father's creditors, Lord Mackenzie having decided in favour of the former, Lord Eldin, who succeeded him as Ordinary, altered the decision, and his view was confirmed in the Inner House. On an appeal, no appearance was made for the respondents, and, in the absence of pleadings, the House of Lords reversed the decision, and adopted Lord Mackenzie's view, as his lordship had given reasons at length, while no reasons had been given for the other decision.

Change of Possession.

A change of possession, palpable to all the world, is undoubtedly the most effectual manner in which the conveyance to a child can be secured; and in such a case as where a manufacturing concern, or a lease, changes occupants, the change of possession, founded on a sufficient title, will supersede all questions as to the delivery of writs. An illustration of this occurs in the case of *Miller v. Duncan*, 31st May 1825, 4 S. 48, where assignation of a farm being intimated to the landlord, and sanctioned by him, the names in all the carts being changed, the public burdens being charged on and paid by the son, and the sales of produce effected in his name, the conveyance was found effectual against the father's subsequent creditors.

SECT. 2.

FAMILY SETTLEMENTS IN COMPETITION
WITH SUBSEQUENT CREDITORS.

The following propositions are an attempt to embody the doctrines taught in the decisions above cited, and in such others as may be found more particularly to illustrate this branch of the subject in its reference to family settlements, where they are questioned, not under statute, but on the simple ground of their being prejudicial to the rights of creditors.

(158.) *Moveables*.—No private conveyance of moveable property in favour of a child, living *in familia*, will defeat the claims of creditors, posterior or subsequent, whether it be kept in the parent's own custody or be handed over to a third party.

Besides the cases quoted above, (pp. 116-117,) this principle is illustrated in *Geddes v. Waddell*, 5th July 1836, 14 S. 1084. In this case a father, who was solvent, had granted bonds to his children by a first marriage, obliging himself to carry to their account the rents drawn from the heritage that had been left by their mother. The avowed object was to do justice to these children; and the parent considered himself under an obligation to grant the bond. But he was unlimited fiar of the property: the money was not to be payable until his death; and so it was found that the children could not compete with his creditors.

(159.) *Heritage*.—A conveyance, by a solvent parent, of heritable property to his children, if made real by infeftment, and duly registered, cannot be affected by his subsequent creditors, unless the presumption in its favour be removed by the parent's continuing in possession, or it be from this or other circumstances proved to be intended as a fraud on creditors.

See the cases quoted above, (p. 115,) and particularly that of *Roseberry*.

It might be inferred, on analogy, that in the case of those conveyances of moveable property which require the proprietorship and all transferences to be publicly registered, *e. g.* shares in joint-stock companies, a conveyance will be valid against subsequent creditors, on the same principle on which a registered real right to land is valid.

(160.) Registration, not for publication but for mere

preservation, will not make a deed effectual against creditors, if it be in other respects a latent deed to their prejudice, which they are entitled to reduce.

Leckie v. Leckies, 22d Nov. 1776, M. 11581, & v. *Presumption*, App. No. I. See observations on the presumed intention of a party registering simply for preservation, in *Downie v. Mackillop*, 5th Dec. 1843, 6 S. 180.

(161.) In the case of parents making conveyances to children forisfamiliated, or of other relations making alienations to each other, or of persons making alienations to those who are not connected with them, the creditors of the granter will be entitled to reduce them, only if they can prove fraud or latency in the circumstances of the case.

M'Christian v. Monteith, 10th Feb. 1709, M. 4931. But the circumstances may be such as of themselves to infer fraud, &c. without additional proof, *Blair v. Wilson*, 24th Jan. 1677, M. 4927. In one case, a conveyance by a man in favour of his sister and his brother-in-law, was reduced, though infestment had been given. The conveyance was executed two years before bankruptcy. Sasine was not recorded until three-fourths of that time had elapsed; and during the two years the cedent remained in possession of the subject disposed, and carried on his business in it; *Hamilton's Creditors v. Hamilton*, 11th Jan. 1682, M. 11586.

(162.) In cases coming under paragraph 161, a deed is presumed to be onerous, if it appear on its face to be so, and the proof of its being gratuitous lies on the impugner.

Trotter v. Hume, 22d June 1680, M. 12561. The presumption, that a deed granted to a conjunct or confident person, after the insolvency of the granter, is gratuitous, appears, indeed, to be the only peculiar privilege which the act 1621, as interpreted by the decisions, has conferred on the impugners of deeds. See the next chapter.

(163.) *Antenuptial Contract*.—By an antenuptial contract of marriage, a parent may provide to his children *nascituri* an onerous right, by making their provisions payable at a term during his own life.

Competition, Lyon with Easter Ogle's Creditors, 24th Jan. 1724, M. 8150, 12909. The provisions in this case opened up to daughters, only on the failure of an heir-male of the marriage; but the mother being dead, that condition was purified. The

provision was payable at the marriage of each daughter, if it took place during the father's lifetime; otherwise, on her reaching the age of eighteen. That time had not arrived; but the father becoming insolvent, parties at whose instance execution was appointed to pass, raised adjudication, which came in competition with the diligence of creditors. It was pleaded, that the circumstances which distinguished this provision from a mere right of succession, also identified it with an onerous debt. These were, that if the daughter outlived the term of payment, her representatives could claim her provision, and that before that period had arrived, she had a claim against her father's estate as a contingent creditor. She was found entitled to rank as a creditor. See two cases quoted in the reports of the above case, but not elsewhere reported. *Hamilton v. Tenants of Hags*, 21st Feb. 1690, and *Children v. Creditors of Sir Robert Preston*, 15th July, 1691. In *Ballingall, &c. v. Hendersons*, 31st Jan. 1759, M. 12919, the father by his contract bound himself and his eldest son and heir, if he should have one, to pay the portions to the younger children, "to be due and payable to them at their respective majorities and lawful marriages, either of them first happening, with annual rent thereafter," the children were found entitled to rank. The amount of the provision in this case was fixed; but the father had reserved the right of apportioning it among the children. In a subsequent case, which was decided in favour of the creditors, (*Mactavish's Children v. His Creditors*, 15th Nov. 1787, M. 12922,) the circumstances were not, to first appearance, materially different, but the power which the father reserved might have enabled him altogether to exclude some one of the children; and though by one clause the provisions were payable on marriage or majority, yet there was another, which, by attaching the time of payment to the succession and majority of the heir-at-law, virtually extended it to a time after the parent's death. In the case of *Brown v. Govan*, 1st Feb. 1820, F. C., (in which the contract was postnuptial, but being in fulfilment of a prior obligation, was held equivalent to an antenuptial contract,) the provision to the children was to be paid "upon [their] attaining the age of majority, or being married;" but it was afterwards specified that the payment was not to be made till twelve months after the father's decease, and was not to bear interest while unpaid. On this the children were infeft; yet it was found that they could not compete with the creditors.

It is proper to state, that in the subsequent case of *Herries, &c. v. Brown*, 9th March 1838, 16 S. 948, this decision was called in question. The principle, however, on which it was questioned was apparently, not whether the grounds upon which, as above set forth, the decision proceeded, justified that decision, but whether there was not another element which should have been taken into consideration,—this element being the constitution of a trust. "There were words, indeed," said the Lord Ordinary (Fullerton,) "in the marriage contract in that case, which ad-

mitted of the construction that the mother was to be infest in trust for the children. But these expressions were by no means unambiguous; and looking at the report of the opinions of the judges, the question seems to have been considered as one dependent on the obligation to infest, and the infestment taken by the children, without any reference to the specialty of a trust supposed to have been created in the person of the mother." It would appear, however, that such doubts have been cast on the propriety of this decision, that it would be by no means safe to consider it a precedent to the full extent, that a *jus crediti* cannot be conferred by infestment in such circumstances, without the intervention of trustees. In the case of Herries, in an opinion returned by Lords Meadowbank, Corehouse, Fullerton, Moncreiff, Jeffrey, and Cockburn, there is the remark, "We think it possible to take a distinction between that case and the present, founded on the ambiguous and blundered terms in which the deed was executed. But it is unnecessary to do so, for the decision was pronounced by the narrowest possible majority, reversing the judgment of Lord Pitmilley, who was the ordinary."

In the case of Browning v. Hamilton, 25th May 1837, 15 S. 999. where the obligation in the marriage contract was, that in the event of there being children of the marriage "alive at the dissolution thereof," their father and his heirs were bound to dispose to them certain subjects, advantage was taken of the circumstance, that the death of the wife before the husband would be legally "a dissolution" of the marriage, to plead, that as the obligation gave a claim which might have been prestable against the father during his lifetime, his representatives were bound to fulfil it. The husband's father was a party to the contract, and it was thence pleaded, that the provision to the children was "an inherent condition of the title under which he held the lands;" the condition was not inserted in his sasine, however, and it was not allowed as a claim in competition with subsequent real creditors, though it would have founded a preferable claim against gratuitous alienations.

(164.) In an antenuptial contract of marriage, a parent may likewise provide to his children *nascituri* an onerous right by conveying property to trustees for their benefit.

Bushby v. Renny, 23d June 1825, 4 S. 110. In this case the father had reserved the power of apportioning the distribution, but a *jus crediti* was held to be established from the trustees being infest. The question, however, how far the infestment of trustees can confer in a marriage contract a *jus crediti* in favour of the children when the provision is not to be payable until the father's death, was investigated at great length, and with much attention, not only at the bar but on the bench, in the case of Herries & Others v. Brown & Others, 9th March 1838, 16 S. 948. In this case, on an entail and a trust disposition for the management of

the estate and the payment of creditors, (both these deeds creating incidental questions which had only a collateral reference to the subject under consideration,) there followed a marriage contract, in which Ranald George Macdonald, in consideration of the sum of £10,000, as tocher paid on the part of the wife, bound himself to infest certain parties, as trustees for her interest, in an annuity of £2000, &c. and to infest other parties (the Marquis of Lothian and Lord Valletort) "in the lands and others herein after conveyed, in security, and for the more sure payment of the sum of £20,000, of good and lawful money foresaid, which the said R. G. M. hereby binds and obliges himself, his heirs and successors, to pay to the children of the said marriage, if there shall be more than one besides the heir who shall succeed to the lands and estates herein after conveyed, payable at such times and in such proportions as the said R. G. M. shall appoint, by any will or other writing to be executed by him; and failing such appointment, the same shall be payable within six months after the death of the said R. G. M. and shall be divided equally among such younger children; and of the sum of £10,000, money foresaid, in case there shall be only one child of the said marriage besides the heir who shall succeed to the said lands and others, payable to such child at such time, [&c. as above;] which provisions and provision to younger children and a younger child, shall bear interest at the rate of £5 per centum, per annum, from the day of the death of the said R. G. M." The provisions were declared to be in full of all legal claims. The precept of sasine was in corresponding terms, and the parties were infest accordingly. An action of declarator was raised by subsequent creditors concluding that the trustees under the settlement had "no claim as onerous creditors of Macdonald, to entitle them to compete or interfere with the diligence of the pursuers." On advising the cause, the judges of the first division directed a hearing in presence, in consequence of an apparent incompatibility between the case of Brown, (see p. 121,) decided by the second division, and that of Bushby, (see p. 122,) by the first. An elaborate opinion was returned by Lords Meadowbank, Corehouse, Fullerton, Moncreiff, Jeffrey, and Cockburn. They stated, that it could be traced as the policy of the older law, that in all circumstances children had, under marriage contracts, not a *jus crediti*, but a mere *spes successionis*, a view carried to the extent that "a cautioner, for the obligation in the contract, was found not liable to the children, because, although his obligation was conceived in their favour, yet, as representing their father, they were bound to relieve him." It was observed, that as there seemed no principle in the law of Scotland on which it could be maintained that a father might not give to his children *nascituri* as to other parties, an obligation on which they could found a *jus crediti*, the practice was generally thrown upon the principle of feudal law, that the fee cannot be *in pendente*, and that as the father cannot be bound to denude himself during his life, he must be looked upon

as far while the children can only claim as substitutes. It was observed that the poverty of the country rendered it inexpedient at that period for people to tie up their property so as to prohibit their employing it for the advantage of their families, and that the law could not on the one hand allow the parents the free disposal of it, and on the other protect it for the children against the parent's creditors. But instances were mentioned, which showed that the enabling the parent by suitable means to establish a *jus crediti* in favour of children *nascituri* was not inconsistent with the spirit of the law, and among these a case was mentioned which may be found recited in *Gordon v. Sutherland*, 3d June 1748, (M. 12915,) in the terms following:—"The husband became bound to join the sum of 3000 merks, with 17000 merks of portion received with his spouse, and to lay out the same upon good security to himself and spouse, and longest liver, in conjunct fee and liferent, and to the children of the marriage in fee; and how often the sum should be uplifted, that he should so often re-employ the same in the above terms. The man having died bankrupt, action was brought against him by the cautioner, who was bound with him in the contract. His defence was, that the obligation barred only gratuitous deeds, and was no impediment to the husband from laying out the money upon trade, though it should be sunk thereby. But the court found the import of the obligation to be, that, in all events, this sum should be secured to the children of the marriage, and therefore sustained action against the cautioner for replacing the sum." Their Lordships having found from the analogy of this and other cases, that a security might be created in favour of the children of a marriage in such a case as that which was before them, proceeded to inquire, whether such a security had been properly created in that case. They then proceeded,—

"It must be evident at first sight that this is not the case of a simple unconditional provision of a sum payable to younger children at the father's death, in which the presumption of law would operate (contrary to the apparent terms of the obligation,) that the father was to be laid under no restraint with regard to the disposal of the sum, and that the children were only to have a hope of succession. On the contrary, the obligation is qualified with conditions which necessarily import that the father was to be laid under restraints, and that it was the intention of parties that the provision should, in all events, be made effectual to the children. Suppose it had been stipulated that the children were to be infest to the extent of their provision, when they came into existence, or that the father should execute a procuratory for infesting his lady for a jointure, and the children for their provisions, at a period at which it was possible that younger children might exist, that stipulation, in terms of the decision in the case of *Douglas*, would have been construed to mean that a *jus crediti*, and not a *spes successionis*, was contemplated. But the present case is much stronger than that; for trustees are appointed for

behoof of the children from the first, who therefore represent the children, and whose infestment is in all respects equivalent to an infestment given to the children themselves after they came into existence. Even if the rule were still considered to stand upon its old foundation, that the father must have the power of disposal, because the fee remains in him until children are born, it would not apply to this case, for the marriage trustees hold the place of the children. There is no necessity for the fee being *in pende*, for it vested in them from the date of the contract; nay, they had a feudal fee in the lands to the extent of the provision from the moment the precept of sasine was executed. Suppose there had been any defect in the precept, for example, if the lands had been misnamed, or a wrong tenure specified, or wrong symbols appointed to be given, the trustees would have had an action against Mr Macdonald, in his lifetime, to grant a new precept in proper terms, or, failing the trustees, the younger children themselves would have had an action against their father to that effect. When the interest of the provision is made payable during the father's life, the children are held not only to have a *jus crediti* to the extent of that interest, but for the principal also, although not payable till after the father's death. That decision proceeds on the ground that an obligation to pay interest plainly implies an obligation to secure the principal for payment of the provision when it becomes due. But here there is not an implied, but an express obligation to secure the principal; and it is secured by an infestment in the persons of the marriage trustees, which puts them in possession of the estate to the extent of the provision, and entitles them to hold it until the provision is paid. The precept ordains that real, actual, and corporal possession of the lands shall be given to them for the more sure payment of £20,000 to the children. Nor is this all; for not only are the marriage trustees infest for payment of the provision, but when the trust 1811 is executed or expires, Mr Macdonald's own infestment in the estate is expressly burdened with this sum of £20,000 in favour of the children. How can it be said that he is the unlimited fiar of that £20,000, or that it is placed entirely at his disposal, when it is expressly rendered an encumbrance upon his right of fee?

"The case may be viewed in another light. We have seen that an obligation to infest the husband and wife in conjoint fee and liferent, and the children *nascituri* in fee, in a certain sum, which unquestionably left the husband the fiar, nevertheless constituted a *jus crediti*, because it was followed by an obligation that as often as the husband should uplift the sum, he should re-employ it; and that, consequently, the husband being bankrupt, action lay against the cautioner, the court finding the import of the obligation to be, 'that, in all events, the sum should be secured to the children.' But in this case there is a much stronger obligation than to employ and re-employ,—for the fund is, in effect, placed in the hands of the marriage trustees that

they may prevent it from ever being employed except in implement of the provision. Nay, there is a double heritable security granted to the children, for not only are the trustees infeft in the lands for more sure payment of the provision, but it is stipulated that the fee shall return to Mr Macdonald under the burden of that provision. So that they have a right to two separate infeftments for their security, one in the person of their trustees, that is, in effect, in their own persons; and another in the person of their debtor, constituting a real burden in their favour.

“ The argument on which Messrs Herries, Farquhar, & Co. chiefly rely, and which was also resorted to in the case of *Brown v. Govan*, is founded on the nature of a right in security. If it be conceded, they say, that Mr Macdonald, by becoming bound to pay a sum to his children *nascituri* at his death, conferred upon them no right of credit, neither did he confer it by becoming bound to find security, or by actually finding security for implement; because an obligation, purely accessorial, cannot extend or alter the obligation to which it is an accessory, for it is an axiom of law that the cautioner cannot be bound farther than his principal. We think that there is a satisfactory answer to that argument. The obligation in the marriage contract, as we have already remarked, confers *in terminis* a right of credit; and it is not so construed only because a presumption arises, from the relative situation of the father and his children, that he does not intend to restrain himself in the disposal of the sum provided, or against any acts, except those of gratuitous or fraudulent alienation. But the very circumstance that the father binds himself expressly to find, or does find security ‘ for the sure payment of the sum,’ shows the meaning of parties to be, that it should in all events be made furthcoming to the children, and the extraneous presumption being removed, the obligation is left to take effect, according to the natural and proper import of the terms in which it is conceived. Take the case that the father binds himself, in his marriage contract, to find personal caution for implement of a provision of this kind, or that a person is bound as cautioner along with him in the contract, it is admitted on all hands that in modern practice (though anciently it was not so) the cautioner is liable to the children if the father should become bankrupt. But if the father’s obligation imported nothing more than that he should do no gratuitous deed to the prejudice of the children, and if he does no gratuitous deed to their prejudice, the implement on his part is complete, and consequently his cautioner for implement ought to be no further liable. But Mr Erskine observes, that marriage settlements of this description are ‘ effectual against a cautioner who has engaged himself in the marriage contract for the father’s performance of his obligation, for the plain language of that engagement is, that he shall make the provision effectual to the heir in case the father himself should fail.’ On the very same principle, if the father’s heritable estate is engaged for the per-

formance of the obligation, by an infestment over it, standing in the person of the children, or what is precisely equivalent, in the person of trustees for their behoof, the plain language of that engagement is, that the provision shall be made effectual by means of the infestment, if the father fails to do so out of his other means. We can see no distinction in so far as this point is concerned, between the obligation of a personal cautioner and the encumbrance on an heritable estate. If the encumbrance is effectual as security only against gratuitous deeds, the obligation of the cautioner should not extend farther; and, on the other hand, if the cautioner is bound that the whole sum shall be forthcoming to the children, the infestment must, in like manner, be available for the whole sum. If there is any distinction between the two cases, we think it is in favour of the children; for, since the infestment is published by the record, all the arguments against a *jus crediti*, founded on the danger of latent rights between fathers and their children, on the expediency of freedom of commerce, and the power of contracting debt where the whole is not duly certiorated of the restraint, are entirely removed. Further, there is a great deal more in a real security than in the personal obligation of the cautioner, for the provision is actually delivered over into the hands of the trustees, since they are put into the actual and corporal possession of the lands, to be held by them for the use of the children, and, as has been before remarked, it is the same thing as if the children themselves had been put into the fee of the lands.

“ It appears to us that the opinion of Lord Eskgrove, in the case of Redcastle, throws light upon this point. It was strongly argued for the creditors in that case, that as the provision was not payable till after the father's death, it only afforded a *spes successionis*; and although interest was payable from a term which might happen in his lifetime, that action could be competent against him only for the amount of the interest, but not of the principal, and consequently, that *quoad* the principal, the obligation stood in the ordinary situation. Lord Eskgrove observes, — ‘ I am for adhering to the former judgment. Every question in a marriage contract, in which children are concerned, is to be interpreted favourably for the children; for marriages, so far as children are concerned, are onerous, and entitled to a liberal construction in favour of the children. If clauses appear, which can receive no other interpretation than a *jus successionis*, there is no help for it; but when a provision is given in terms that bestow a *jus crediti*, and give a ground of action to the children against the father, they are as truly onerous as any debt which the father can be owing. This contract gives a provision to the children; had there been trustees, might not they have pursued the father for security? Surely. Had the marriage dissolved after the existence of two children, then the younger must have had an interest to pursue for security; when there is none, they have all a joint interest. It is highly proper for the community, that

obligations of this kind should be liberally interpreted.' It was inferred in that case, therefore, from the clause with regard to interest, that if there had been marriage trustees, they might have pursued for a security, on which ground it was held that the provision conferred a proper *jus crediti*. But in the present case there are marriage trustees; and it is not matter of inference that they might pursue for security, because it is expressly conditioned that they shall have a security; and moreover, the security itself is actually given to them by means of an infestment, the highest of all securities. This, therefore, is plainly an *a fortiori* case, according to the opinion of one of the first legal authorities of the last century.

"Further, it may be remarked, that the presumption of law has been reversed with regard to provisions of this nature, and that it is now more in accordance with the present state of society and the probable views of parties entering into marriage settlements. Formerly, it 'was held that contracts of marriage are favourable and onerous, in so far as concerns the liferents provided to wives; but *quoad* children's provisions, they are never reckoned onerous but in competition with the father or children of another marriage, and noways restrain or bind up the father from contracting posterior debts, but only that he shall do no voluntary, gratuitous, or fraudulent deed to their prejudice.' And the rubric of the case of *Gordon v. Sutherland* is in these terms—'A settlement in a contract of marriage is, *in dubio*, not understood to give more to the heirs *nascituri*, than a *spes successionis*.' But the presumption, as laid down by Lord Eskgrove, is exactly the opposite. Marriage contracts, he says, 'in so far as children are concerned, are onerous, and entitled to a liberal construction in their favour; and it is only when clauses appear which can receive no other interpretation than a *jus successionis*,' that the children are to be denied the right of proper creditors. The first presumption was natural, a century and a half ago, when Scotland was a poor country, and when, in the ordinary case, no man could well afford to deprive himself of the use of the trifling capital that might be in his hands. The reverse is the case now, where there are few parties to written marriage settlements who do not wish that some provision should be effectually secured for the benefit of the younger children. Take the present instance. It cannot for a moment be supposed, when an English lady of high rank and considerable fortune, was marrying a gentleman of extensive landed estates in Scotland, and those too placed under a strict entail in favour of the heir-male of the marriage, that it was the intention of the lady, or of her friends and trustees, parties to the contract, that all the younger children should be left totally unprovided for, in case the husband's affairs should become embarrassed. And such is the ordinary state of matters in these days, well warranting the rule of construction which Lord Eskgrove adopted in the case of *Redcastle*."

From these views, it is a necessary inference, that a sasine may

cover an indefinite security, and it would be useful if the extent to which this doctrine, which is calculated to open up new views of the nature of that deed, might be allowed to be carried into practice. In the case immediately under consideration, the contingency which stretched the security to its full extent had occurred, viz., the birth of more than one younger child. The question is thus simple in comparison with what it might have been, but the principle of the above quoted opinion would appear to include the case of a contract which enlarges the extent of the fund secured, with each addition to the family, and its application to such a case would be more complex. Suppose that in virtue of the contract the trustees were infeft in the very same words of style as those employed in this case, in a sum which should be £1000 for each child of the marriage. Here the infestment may cover £1000, or £15,000, according to contingencies; and in the one case, it is just as real a right, and as conclusive against creditors, as in the other. It would be an important point to know what are the rights of creditors while the contingencies which thus tend to decrease the estate from which they have their chance of payment are in progress. It would be a legitimate deduction from the above opinion that the sasine covers the whole extent of the provisions which the contingencies may create; yet few would be prepared to vindicate a practice which, after the birth of the first child, and before others are born, would keep £14,000 of the father's fortune safe from the diligence of creditors, until it should be seen whether children will be born to claim the money.

The analogy between an infestment and a cautionary obligation would probably be found to fail if carried fully out. If by the older doctrine of cautionry it was held so strictly an accessory obligation that it could not be brought into existence except as supplementary to some other obligation, that doctrine has disappeared, for the very imperfection of the principal obligation, (*i. e.* the imperfection of the legal means of enforcing it,) may be the cause of creating the cautionary obligation, and such seems to have been the view so early as the case of *Dickson v. Murray*, 18th Dec. 1707, M. 12938. It will not be denied that a cautioner, if he choose, may bind himself to certain trustees to see the children of a marriage paid certain sums, the very reason why such an obligation is sought from him being the impossibility of preventing the parent from wasting the fund from which the provision should be paid, by contracting debts. It is an old fiction of law, that in those cases where the law refuses to support provisions to children against onerous creditors, the contraction of debts is held as a revocation of the provision. In the case, therefore, of a cautioner having bound himself to see the provision paid, there would have been some such reasoning in a circle as this. It is true that the cautioner became bound to pay the children's provision in the case of the parent rendering himself unable to do so, by incurring debt.

But the parent, by incurring debt, has *tanto* cancelled his own obligation. The cautioner's obligation is but accessory to the parent's, and when that is cancelled, the cautioner's is cancelled also. Therefore, the obligation of the cautioner, intended for the purpose of securing the children against the effect of the debts of their parent, becomes cancelled whenever those debts are incurred. As elsewhere stated, (p. 117,) this fiction is cumbrous and antiquated, and the later decisions do not seem to acknowledge its existence.

There may be this much of analogy between a cautionary security and a real security, that neither of them can be so far indefinite as not to be limited beforehand, either by a specification of the amount to be covered, or by the fixing of some criterion by which that amount is to be ascertained. Undoubtedly, however, it is not inconsistent with the principle of the former to be increased according to some pre-arranged ratio, by each one of a succession of contingencies, as in the case of a bank agent. Unless in so far as they are struck at by the act 1696, real securities may certainly be granted, the exigible amount of which is not fixed; but it is necessary, or at least is understood by the older law to have been so, that the limits to which it can be exigible must be fixed. It is, perhaps, not usual to grant unlimited cautions for the intromissions of responsible persons; but there is no law against such a cautionry. The incompatibility of a sasine to cover any such obligation will be at once perceived; yet if sasine can be taken to trustees for a certain sum in favour of each one of an unlimited number of children, there is no difference in the principle of the two cases, though undoubtedly there would be a practical difference in the circumstance, that it would be easy, from the known course of nature, to name bounds which could not be exceeded, in the latter case. In the old litigations as to heritable securities for cash credits, before they were legalised by the Sequestration Act, independently of objections under the act 1696, the bench seemed to look on such ambulatory securities as not compatible with the nature of an infestment. In *Pickering v. Smith & others*, 16th Jan. 1788, M. 1155, it was observed from the bench, "So salutary an enactment [the act 1696] ought not to be narrowed in its construction. Far from introducing any innovation, it does no more than confirm the doctrine of our feudal law. The loan of the money was essential to the constitution of the right in question. But it is absurd to conceive this right continually fluctuating between existence and non-existence, according as the money, during the currency of the cash-account, should have been paid, repaid, and paid again; the creditor being, of course, the vassal one day,—the next, not so,—the third, a second time vassal,—and so forth." If a case such as that under consideration, be not subject to the fluctuations which thus affect the original debt in a cash credit, it has another characteristic which seems to make it more uncongenial to the nature of an heritable security, than any thing for a cash credit can be. In a cash credit the ultimate

sum which the security can in any circumstances cover, is at all events determinate. In case of an infetment of trustees in favour of children *nascituri*, it must be considered indeterminate from the beginning, unless (what will hardly be maintained) it be from the beginning a security covering the utmost amount that the existence of any given and physically possible number of children existing of the marriage could bring as claimants on it. Before concluding the notice of this case, it may be mentioned, that so early as the case of *Marjoribanks v. Marjoribanks*, Feb. 1682, M. 12891, which was decided against children *nascituri* represented by trustees, (or persons at whose instance execution was to pass,) it was noticed on the bench, that if there had been an infetment in favour of the children, the question would have been more doubtful.

(165.) By an antenuptial contract of marriage, a provision may be made onerous in favour of children *nascituri*, by making interest run from a point of time which may occur during the lifetime of the granter.

M'Kenzie's children v. Chalmers, Bell's Cases, 404. Here the husband received a marriage portion with his wife. The parties to the contract were the parties about to be married and their respective parents. The provision was to younger children, "to be divided among them in such manner as the said Kenneth M'Kenzie [the bridegroom] shall think fit by a writing under his hand; and failing such division, to be distributed among them equally; the said provision to be payable only at the father's death, and to bear interest from the majority or marriage of said children, whichever of them shall first happen; the said K. M. and his foresaids being always obliged to give the said children education suitable to their station; and to maintain them at bed and board aye and until the period at which the interest upon their provisions shall fall due and be payable." The children claimed in a ranking and sale. The case was fully argued, and is very amply reported. It was pleaded for the creditors that, "if a clause, for payment of interest at majority or marriage, which is the single point specially founded on, should be sufficient to take the case out of the rule, an easy way will be found for a man to provide for his children though he should spend his estate, and in every ranking these claims will start up in formidable opposition to the just and lawful creditors, and although they could not have disquieted the bankrupt, they may ruin his creditors."

(166.) When a third party joins in an antenuptial marriage contract, if any right or privilege of a party be given up, or any engagement be come under in consideration of the obligations on his part, these obligations

constitute a *jus crediti*, though they should not be prescriptible until after his death.

Gordon v. Murray, 9th Feb. 1833, 11 S. 368. In a contract of marriage the bride's father, (who in the ratio of the decision was considered a third party,) had bound himself and his representatives to pay to the married couple a sum of money within twelve months after his decease, the sum to be lent out on heritable security, and the bond taken to the married couple in life-rent, and to the children of the marriage in fee. As a counterpart (it was maintained) of this obligation the husband had in the contract provided his wife with an annuity in the case of her surviving him, and *she* had renounced all claim against her father's estate for *legitim*. The obligation was found onerous to the extent of being ranked as a debt to the daughter in life-rent, and her children in fee. The Lord Ordinary (Moncreiff) in a note observed, "The onerous contracting is direct: all the parties interested—the husband (a stranger) for himself, the wife for herself, and both for the children, are third parties *quoad* the granter of the obligation; and he transacts with them for the marriage, and for the counter obligations, as directly and onerously as he might purchase any other benefit to himself, and grant a *post obit* bond for the price. The trustees' counsel admitted, that if such a provision were made by the uncle of the lady, he could not deny that it would be an onerous debt. But the circumstance of the third party transacting being her father, does not seem to alter the onerous character of the transaction itself." This important case clearly settles the two points, 1st, that a marriage contract may be so framed that a third party may embody in it a provision for the children of the marriage, which, though not payable until after his death, shall constitute a debt against his estate; 2d, that to this end every person other than the parties about to be married to each other, is a third party. It cannot be distinctly collected, however, what precise terms are necessary to accomplish this end. In the first place, it is not quite clear that the circumstance pleaded by the daughter, viz. the renunciation of her *legitim*, was the ground on which the court viewed the transaction as onerous; although it would appear to have had some weight, for Lord Glenlee remarked, "Now, here the daughter was about to be forisfamiliarated, and she renounces her *legitim*. I have no doubt that was an onerous agreement. If a party onerously contracts with his child for the discharge of her *legitim*, it is just as much an onerous cause as the renunciation of the lease in Thomson's case," (see below, p. 133.) But supposing it to be thus fixed that to make the obligation of the third party onerous, there must be some counter obligation (such as the renunciation of the *legitim* in this case,) on the part of the party benefiting, it cannot be clearly deduced what specific obligation, other than the precise one to which the decision applies, would implement this requisite. In illustration of this

subject, the case above alluded to of *Thomson v. Gourlay*, 11th May 1824, 2 S. App. 183, may be consulted. Here a son had renounced a lease and some other claims against his father. Among the other considerations which he received for doing so was a bond for £4000, payable after the father's death to him, in trust for the children of a marriage he was about to enter on. The father was solvent when he granted the bond, but became afterwards bankrupt. The son was found entitled to rank on his estate.

CHAPTER II.

RIGHTS OF CREDITORS UNDER THE ACT 1621.

SECT. 1. ALIENATIONS BY INSOLVENT PERSONS.

(167.) At the instance of any creditor pursuing for a just debt, "all alienations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his lands, teinds, reversions, actions, debts, or goods whatsoever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after the contracting of lawful debts to true creditors," are to be declared null.

1621, c. 18.

(168.) *Insolvency*.—The "being done after the contraction of lawful debts," has been held to refer only to acts done when the actor is "insolvent;" and in reductions under the act, it is necessary to libel insolvency at the date of the transaction sought to be reduced.

An action was dismissed which, though it libelled in general terms insolvency, did not specifically state the existence of insolvency at the time of alienating. *Wood v. Dalrymple*, 4th Dec. 1823, 2 S. 555. According to the phraseology of the enacting part of the statute, an alienation is struck at if made "after the contracting of lawful debts;" and it was naturally inferred that if gratuitous, it might be reduced by a creditor who could not obtain satisfaction from the granter's estate, although the defalcations which prevented him from obtaining payment had arisen subsequently to the alienation, provided there had been debts contracted before it. It was decided, however, in a case which occurred a few years after the date of the act, and when the

object it was intended to serve must have been full in the view of the court, that contracting lawful debts meant incurring obligations which the creditor cannot meet; and that the term did not, according to its modern popular acceptation, apply to pecuniary obligations which the debtor was able to meet, but of which he delayed or resisted the fulfilment. In the case in question, Durie reports, among a multitude of other points discussed, the following:—"In this process it was found, that a disposition, albeit made without a cause onerous by the debtor, after he was debtor to his preceding lawful creditors, could not be found as coming under the act of dyvory, except the debtor who disposed had been dyvour; for he not being bankrupt then, the prior creditor could not, upon that act, then quarrel the posterior right, made *etiam sine causa onerosa*." Borthwick v. Goldilands, 5th March 1629, M. 914. The use on this occasion of the words dyvor and bankrupt, although they were not then employed in the precise acceptation now held by the latter, seems to indicate an understanding that the inability to meet the demands of creditors must have been public and notorious. In a case which occurred a few years afterwards, there was still a reference to some public evidence of bankruptcy, and it was found that the gratuitous cedent "not being bankrupt, but being able to pay all his debts in lands and goods, might lawfully, *ex causa simplicis donationis*, effectually grant this infestment, albeit he was then debtor to his creditors." Garthland v. Ker, 6th March 1632, M. 915. In the next reported case in 1675, the law appears to have been by no means in a settled state, for it is urged on the one hand, that all gratuitous deeds are reducible where creditors have an interest to reduce them; and on the other, that the bankruptcy of the granter is requisite to justify the reduction. It was found, after much discussion, "that debtors might dispose of a part of their estate by way of gift, and without an onerous cause, if they retain as much and more than would satisfy their creditors." Clerk v. Stewart & Watson, 30th June 1675, M. 917. See M'Kell v. Jamieson, 10th Nov. 1680, M. 920; Creditors of Dewars, 22d Dec. 1710, M. 923. In A. v. B. 17th Nov. 1837, F. C. an accountant's report on the state of the cedent's funds, showing that the assets exceeded the debts, settled the question of solvency.

(169.) A gratuitous alienation will be struck at, if, by the addition which it would make to the previous obligations of the granter, it makes him insolvent, although, immediately before granting it, his debts did not reach the extent of insolvency.

1 St. 9. 15. See M'Kenzie v. Fletcher, 15th Jan. 1712, M. 924; Queensberry v. Mouswell, 5th and 6th Jan. 1777, M. 961; Clerk v. Stewart, 30th June 1675, M. 917; Spence v. Creditors of Dick, 10th Jan. 1694, M. 1017; and the other cases on this act which are generally applicable to alienations of

land, and bear that the alienation is good if the grantor have retained enough to pay his lawful debts. It was held at one time that he must have possessed *heritable* property sufficient for this purpose. In the case of *Callander v. M'Kell*, 10th Nov. 1680, M. 932, the court first decided that the alienation should be reduced, unless it were "proved that the father disponer left a visible estate, not in personal bonds or money (for that may be daily altered) but in heritable rights sufficient for payment of the pursuer's debts libelled; . . . but the Lords altered this afterwards, and only required a visible estate *quomodocunque*." A like principle was brought out in *M'Kell v. Jamieson*, 10th Nov. 1680, M. 920. Afterwards, in 1688, it was decided in the case of a provision to younger children, "that the father could not secure the children's provision by infestment upon the land estate, and leave the creditors to expiscate and seek for the moveable estate." *Mouswell v. Queensberry*, 20th July 1688, M. 932. The question appears not to have again occurred; but in the later cases it seems to have been taken for granted that it is on the question of solvency alone, and not on the nature of the free estate, that the validity of the alienation depends. See *Meldrum v. Kinnier*, 11th Dec. 1717, M. 928; *Ballantyne v. Dunlop*, 17th Feb. 1814, F. C. The decisions, however, leave many questions in relation to this subject in an unsatisfactory state. Thus it seems not clear whether an alienation which would make the grantor insolvent is reducible *simpliciter*, or only to the extent to which it would have exceeded the grantor's clear estate at the time of granting. In one case, (*Deas v. Fullerton*, 7th Dec. 1710, M. 921,) "the Lords preferred the executor-creditor, and reduced the assignation, not simply, but in so far as it prejudged him." But the question upon which this was put was, not how much clear estate the cedent had when he assigned, but how much remained over at the time of the creditor's action. The case was full of specialties, and the court, without founding on any general principle, seemed to think that there were attempts to keep the available funds out of the way, (the cedent being dead,) and that the simplest way of doing justice, was to give the creditor access to the assignation. In a still older case, (*Creditors of Tarpersie v. Kinfawns*, 18th Dec. 1673, M. 900,) the court interfered in a similar manner for the protection of creditors. The insolvent had conveyed his estate to his uncle, for the purpose of favouring particular creditors. The disposition was reduced to the extent of admitting all the creditors who had not been favoured, to claim to the amount they would have received if the creditors had been all ranked *pari passu*. It must always be kept in view, in attempts to deduce a principle from old decisions in such a question as the present, that the court was much more frequently occupied in finding out the means of giving redress against frauds, which a strict interpretation of the law could not reach, than in following out any definite principles applicable to all cases. It would frequently occur that, while the debtor was

perfectly solvent after having granted a conveyance to a conjunct or confident person, the subject so conveyed was the only part of his estate to which the creditor could get access, and that the conveyance was distinctly designed to baffle them. Against a hardship which could hardly now occur,—and as to which, if it did occur, the court, from its stricter system of pleading, could not now interfere, the judges of the seventeenth century were always anxious to give redress.

(170.)—It follows, from the above principles, that insolvency occurring subsequently to the alienation, and from a change of circumstances, (*e. g.* from the failure of an apparently sound source of income, depreciation of stock, &c.) will not affect the alienation.

Although there can be little doubt of this as a general principle, its application to practice is involved in some obscurity, arising out of the questions as to the presumptions on the subject, to be presently considered. “The subsequent depression of the funds,” says Professor Bell, “or the fall of markets for land or goods, will afford a good answer to the question of insolvency, where, on a fair reckoning of the estate, as at the date of the deed, the debtor was solvent.” But “no rights merely *in spe*, (as expectations of succession,) can be taken into account in reckoning solvency or insolvency, however immediate the succession may seem to be, and although, *ex eventu*, the debtor has actually succeeded, unless by such succession the debtor has been restored to solvency,” (2 B. C. 193.) Apart from these two cases, however, there are many others connected especially with the fluctuation of commercial enterprise, as to which the want of any series of recent decisions on the act, deprives us of fixed principle. It does not appear in conformity with the spirit of the law, that a man engaged in large and fluctuating speculations, such as marine insurance, the corn-trade, the indigo trade, &c. should, at a moment when he may have a large balance of profits in his favour, be entitled, leaving creditors unpaid, to remove a portion of his funds from the operation of their diligence, while with the remainder he proceeds with speculations which speedily reduce him to bankruptcy. In some of the older cases, indeed, a supervening bankruptcy seems to have been sufficient ground for reducing the deed. Thus, in *Stuart v. Robertson’s Bairs*, 10th Feb. 1688, M. 969, “the lords preferred the posterior creditors, though the debtor was no trading merchant, and was not bankrupt at the granting of the bonds of provision, he being now bankrupt by cautionry;” but the latency of the deed seems in this case to have actuated the court in its decision. See *Kilgour v. Thomson*, 16th Feb. 1628, M. 910; and see above, p. 115. It is stated by Professor Bell, “that wherever the debtor is insolvent at the time of the challenge, there is a legal presumption of insolvency

at the date of the deed, if granted to a conjunct and confident person, and challenged by a prior creditor," (2 B. C. 193 ;) but it is to be regretted that this rule, so conformable with the spirit of the statute, is scarcely supported by decisions. In the case referred to in support of it, *Creditors of Cult v. the Younger Children*, 5th Aug. 1783, M. 974, the provision was to younger children, and accrued as at the date of their father's death. The question at issue was, whether he died solvent or insolvent, the estate having turned out to be insolvent two years after his death. The ratio of the decision was, that having been so found insolvent, it remained for the children to instruct that this insolvency was not the natural result of the state in which the deceased left his property, but arose out of the proceedings of the creditors. The interlocutor found, "that the creditors were guilty of no culpable neglect, in not doing diligence sooner for their debts: also find, that there is now confessedly an insufficiency of funds belonging to the late William Wardrobe, for payment of his debts; and that the younger children of the said William Wardrobe have not produced sufficient evidence to show that their father's estate in Scotland, at the time of his death, was sufficient to answer the debts he then owed, and their provisions." The presumption, therefore, was merely to the extent that the deceased's estate being found insolvent soon after his death, was so at his death, and was merely in favour of the honesty and diligence of those who had intromitted with the estate. From such a presumption, it is clear that no rule can be drawn applicable to the case of a living insolvent who has had the free use of his own property; and there are some cases which lean towards the doctrine, that though the granter be insolvent at the time when the alienation is challenged, it is necessary to instruct that he was so also on the occasion of executing it. The case of *Balantyne v. Dunlop*, 17th Feb. 1814, F. C., was that of a father granting a provision to the mother of his illegitimate children, who was held to be a conjunct person. Three years after granting it, he executed a trust-deed for behoof of creditors, and he died insolvent. The Lord Ordinary allowed the bond of provision to rank; and on a reclaiming, the Justice-Clerk (Boyle) observed, "that *if evidence of Dalrymple's insolvency had been produced*, he would have doubted of the interlocutor, (of the Lord Ordinary,) but it was not *clearly made out* that he was insolvent." In the case of *Mansfield v. Stuart*, 13th Feb. 1833, 11 S. 389, the Lord Ordinary's interlocutor, which was adhered to, found an alienation not challengeable by the trustee for the creditors, "in respect he does not allege that he is trustee for any creditor prior to the date of said bond, and that he does not undertake to prove *that at the time of granting it* Mr Stuart was insolvent." In old cases, however, in which it seems to have been generally known that the only property which the insolvent could possibly possess was land, the question whether the insolvency went back to the time of the alienation, seems to have been inferred from the state

of matters at the time when it was challenged. *See* Blackbarony, &c. v. Pitmedden, 10th Feb. 1715, M. 972. In *M'Lierie v. Glen*, 5th Dec. 1707, M. 12563, the extent of the alienation, which nominally covered a larger estate than the cedent could by any rational inference have possessed, seems to have been a ground for inferring insolvency. In the case of *Holwell v. Cuming*, 31st May, 1796, M. 11583, in which, however, the "decision was rested chiefly on the general presumption pleaded for the pursuer," (the presumption that the deed was undelivered,) "the insolvency of Captain Wedderburn, which, in the *circumstances of the case*, was to be presumed *retro* to the date of the bond, was mentioned as one foundation." Thus, it does not appear to have been held a *presumptio juris* that the insolvency was to be presumed *retro*; it was only held a presumption in the *circumstances*. In the case of *Spence v. Creditors of Dick*, 2d Dec. 1692, M. 1014, in which the decision was founded on another principle, it is laid down as an admitted principle by the reporter, (Fountainhall,) "though in law every man is presumed solvent, and not bankrupt, yet when a man disposes his land to a near relation, it is presumed that it is *omnium bonorum*, unless it be instructed that he had a farther estate beyond that which is disposed." If this, however, were held to contain an accurate view of the law, it would authorize the inference that all deeds to conjunct persons are *presumptione juris*, conveyances of the granter's whole estate necessarily inferring insolvency, unless there be proof of the contrary. This presumption appears to have been raised on a limited view of the purposes of the act; a view limited, at least, in comparison with those to which it has been generally applied. It seems to have been supposed that the act was only intended to strike against fraudulent conveyances to those near relations for whom the granter would wish to provide, to the prejudice of his creditors, and to whom, it was thence inferred, that he would convey his whole estate. The act, however, strikes against alienations to those parties who, by their position, will be presumed likely to serve the debtor, to the prejudice of his creditors; in short, to act as trustees for him; and it is in this spirit that it attacks every act by which the debtor conveys away any portion of his estate to conjunct or confident persons.

SECT. 2.

ALIENATIONS TO CONJUNCT AND CONFIDENT PERSONS.

(171.) The alienations struck at by the act 1621, are such as are made to "conjunct and confident persons," or, as they are more specifically described in the preamble, "wives, children, kinsmen, allies, and other confident and interposed persons."

(172.) *Conjunct Persons* are relations, within certain limits; and the degrees of relationship which form a statutory ground for the declinature of a judge, have been referred to as the criterion; but it has not been precisely fixed by the decisions.

Elibank v. Adamson, &c. 8th Feb. 1712, M. 12569. The statute regulating the declinature of judges, is 1681, c. 13. By this rule, the term will include not only parents and children, and brothers and sisters, but fathers-in-law, sons-in-law, brothers and sisters-in-law, uncles and aunts, and nephews and nieces. See *Skeen v. Betson*, 17th Jan. 1632, M. 896; *Hume v. Smith*, 5th July, 1673, M. 899; *Tarpersie's Creditors v. Kinfawns*, Dec. 1673, M. 900; *Kolston v. Weir*, Nov. 1682, M. 902; *M'Kenzie v. Fletcher*, 15th Jan. 1712, M. 924; *Brown & Others v. Murray*, 6th July 1754, M. 886.

These cases are in general, it will be observed, of earlier date than the statute as to judges. In one case, at least, the rule has been treated as wider than that regarding the declinature of judges, and as identical with that of the prohibited degrees in marriage, whether by relationship or affinity,—*Mercer v. Dalgarno*, 19th Dec. 1694, M. 12563. It has been found, however, that uncle and nephew by affinity are not conjunct in relation to each other; that is, that a wife's uncle, or the husband of an aunt, is not conjunct, and *vice versa*. *Elibank v. Adamson, &c.*, 8th February 1712, M. 12569.—It may be doubtful whether the equivalents of these are forbidden degrees in the law of marriage. The husband of a wife's sister has been found not to be conjunct. *M'Gowan v. M'Kellar*, 24th Feb. 1826, 4 S. 498. It has been found that a cousin-german is not a conjunct person, *M'Dowal v. Fullerton*, 8th June 1714, M. 12569. In 1679, Fountainhall reports that this question was much debated, and that the leaning was to consider the cousin conjunct, (3 B. S. 314.) In *Sinclair v. Dickson*, 22d June 1680, M. 12562, a cousin seems to have been considered conjunct. The mother of an illegitimate child has been held conjunct to the father, *Ballantyne v. Dunlop*, 17th Feb. 1814; perhaps it would be more accurate to call such a person "confident." See below.

(173.) *Confident Persons*, are such as are connected with the granter of the deed in the relation of superior or inferior, of employer and employed in business transactions, or of partnership in business; but there are no means of making a general rule for ascertaining what classes of persons are confident, independently of the circumstances of each case.

The object of the act was in the first place to strike at all gratuitous deeds granted by a man in favour of those who, either by their relationship towards him, or by a common interest arising

from their connexion in business, might be persons on whom the insolvent could rely, as having an interest in favour of himself and adverse to his creditors at large. At the time when the act was passed, there could have been little difficulty in pointing to one man as confident to another; for society being more generally divided than it is at present into superiors and dependants, services were not often distributed among many employers, and the very circumstance of receiving pay, constituted the receiver the retainer and "confident" of the employer. The quality of being "confident" must be deduced from a series of circumstances indicative of the connexion between the parties; and among these, undoubtedly not the least important in their influence must be those connected with the granting of the deed challenged. As persons presumed to be included, Professor Bell enumerates,— "Partners in trade, servants, factors, confidential men of business." (2 B. C. 187.) It is decided, that "a constituent is not a confident person with regard to his factor, though a factor may be with regard to his constituent." *Buccleugh v. Sinclair & Doual*, Dec. 1728, M. 12573. There are few decisions on this subject; it has been found that a party who acts as curator or trustee for the illegitimate son of a deceased brother residing in his house, is confident. *Laing v. Cheyne*, 18th Jan. 1832, 10 S. 200. The term used in the report is "conjunct and confident," as if the uncle's position were held to partake of the nature of both. It would seem that illegitimate relationship does not constitute of itself a conjunct person in terms of the act; and it would produce inextricable confusion to hold that partial relationship, added to a partial business connexion, may be added together to make up the requisite of the act. Undoubtedly the relationship of the parties had its influence on the decision, but it could only legitimately do so as one of the circumstances indicative of the *confident* position of the elder party to the younger in their relative situations as guardian and ward. An intimate friend of the father, appointed guardian to the illegitimate child who lived in his house, would be in the same position. In the older decisions there is occasional confusion between the two terms conjunct and confident. In *Lourie v. Earl of Dundee*, 6th Feb. 1663, M. 911. a disposition was reduced *quoad* its gratuitousness, "being betwixt confident persons, cousins german." This relationship did not, as above remarked, make the parties conjunct. In reality, the statute seems scarcely to have distinguished the two classes of persons from each other, but the tendency of the decisions necessarily was to require distinct proof of the one quality or the other. Trustees appointed by a father for his son's benefit have been found not to be confident in regard to the latter. *Young v. Darroch's Trustees*, 23d Jan. 1835, 13 S. 305. The trustees had power to withhold the estate till they were satisfied with the son's conduct. They gave it up to him, in preference, it would appear, to defending against him an action which he raised for legitim. The discharge to them was the deed challenged.

SECT. 3.

OPERATIONS TO WHICH THE ACT REFERS.

(174.) The class of deeds which may be reduced under the act are, simply, all alienations whatever, conveying out of the debtor's possession the property on which the creditors might do diligence for their debts.

In the preamble of the act, the deeds against which it is levelled are enumerated as "Simulate and fraudulent alienations, dispositions, and other securities, of their lands, reversions, teyndes, goods, actions, debts, and others belonging unto them." Discharge of a debt or obligation, gratuitously exonerating the debtor or obligor, is a deed liable to challenge. *Laing v. Cheyne*, 18th Jan. 1832, 10 S. 200. But see *Young v. Darroch's Trustees*, as above, where an ineffectual attempt was made to reduce a discharge to trustees. Among the alienations which Professor Bell presumes to be reducible are, the assignation of his liferent by an heir of entail, an assignation or sublease by a tenant, and an assignation of a policy of insurance. 2 B. C. 191. The question as to the gratuitousness and onerosity of deeds is discussed in the next section. A deed which is partly onerous is reducible to the extent to which it is gratuitous. *Gordon v. Ferguson*, 23d Dec. 1679, M. 1012. *Corsan v. Campbell*, 25th Jan. 1751, M. 885. Sir George M'Kenzie cites as reducible some methods of fraudulent alienation which could scarcely now occur, such as allowing a preconcerted decree to go in absence. *Works*, II. 8.

(175.) A payment in money is not affected by the act.

Bean v. Strachan, 1st Aug. 1760, M. 907; *Broadfoot v. Leith Banking Co.* 9th Dec. 1808, F. C. In this case, however, the act 1621 does not seem to have been pleaded. Although a direct transference of money cannot be affected under the act, it would seem that the creditors may have access to any right of property acquired for a conjunct or confident person, through money advanced by the bankrupt. *Anderson v. Neilson* 15th June 1826, 4 S. 717. This doctrine is inferred from the purpose for which a proof was allowed. A father was in treaty for a subject, and, on his becoming bankrupt, it was acquired by his son. On a proof on an averment that the son had obtained the property by his own means, and that his father "did not contribute directly or indirectly any part of the expense," the court decided against the trustee for the creditors. See farther, B. II. Ch. II. § 1.

SECT. 4.

GRATUITOUS AND ONEROUS ALIENATIONS.

(176.) *Presumption of Gratuitousness.*—In the case of an alienation coming otherwise within the operation of the act, the presumption of law is, that it is gratuitous, and it lies on the defender to show that it is onerous. It will not defeat the presumption that the deed itself bears that it is for an onerous cause.

Riddoch v. Younger, 9th March 1639, M. 12554. Hamilton v. Boyd, 15th July 1670, M. 12555. Whitehead v. Lidderdale, 29th Nov. 1671, M. 12557. Napier v. Gordon, 12th Feb. 1670, M. 8755. Stansfield v. Pittachope, 19th Jan. 1676, M. 954. Wilson v. Saline, 24th Jan. 1706, M. 12563. Buccleugh v. Buccleugh's Creditors, 8th July 1757, M. 12575.

It seems to have been at one time considered that the proof of the gratuitous character of the transaction was narrowed by the words of the act,—“And it shall be sufficient probaton of the fraud intended against the creditors, if they, or any of them, shall be able to verify, by writ or oath of the party receiver, &c. that the same was made without any true, just, and necessary cause.” See Hop-Pringle v. Ker, 22d Jan. 1630, M. 12553. Watson v. Malloch, Nov. 1681, M. 883. Cathcart v. Glass, 28th Nov. 1679, M. 1005. But though it is very difficult to extract the precise meaning of these words, they do not bear, in their general sense, an exclusion of other evidence. The words would seem, indeed, rather to infer an extension than a limitation of the ordinary rules of evidence, conveying, 1st, That where the transaction bears on its face the character of onerosity, if unable to prove it otherwise gratuitous, the challenger may appeal to the assignee's oath; and this view is not without precedent, for, in the narrative of the case of Pollock v. Pollock, 21st Jan. 1669, M. 1002, one of the reasons of reduction is stated, “and albeit it bear borrowed money, yet the said James has acknowledged by his oath that it was for love and favour.” 2d, That to support the presumption of non-onerosity, a writing of the assignee will be sufficient, without assistance from parole evidence. It is not necessary, however, to solve the meaning of the legislature in passing the act, as the practice on the subject has long been settled by the decisions.

(177.) This presumption is neutralized by the production of an obligation by the granter, of which the deed impugned is merely the fulfilment; and to enable creditors effectually to challenge the alienation in such a case, they must bring the prior obligation within the act, or must prove such fraud or latency, as would justify a reduction at common law.

Rule v. Purdie, 22d Feb. 1711, M. 12566; M'Kies v. Agnew, 18th Jan. 1739, M. 12574. See Gray v. Chiesly, 4th July 1711, M. 12568; where the onerous cause sustained was a fitted account between the conjunct person and the cedent, "of many articles paid by the former for the latter to third parties, during a long tract of correspondence before, to which there is a docket subjoined, signed by both before witnesses, wherein [the cedent] acknowledgeth himself to be resting to [the conjunct person] a certain balance, for which the bond in question bears to have been granted." The distinction may seem a nice one, but there cannot be much difficulty in adopting it in practice. A deed which merely states itself to be granted for an onerous cause, is easily distinguishable in practice from one which forms part of a series of apparently *bona fide* transactions. It is true that in the latter case, the whole apparent chain of transactions may be an ingeniously concocted fraud; but, if it be so, the presumption in its favour is removeable by proof. In Skene v. Forbes, 15th Feb. 1728, M. 12572, the donee, who was the disponent's brother, produced a "retired cancelled bond" of the same date as the disposition, and regularly attested; this was held to remove the presumption of gratuitousness. Kilkerran, in the report of M'Kies v. Agnew, 8th Jan. 1739, M. 12574, thus briefly lays down the law:—"Where a right is quarrelled upon the act 1621, as granted without an onerous cause, and that anterior bonds are produced for instructing thereof, there is no necessity also to instruct the onerous cause of these bonds; though, had these bonds been the deeds quarrelled, the onerous cause of them must have been instructed."

It is observable that the cases brought in support of the principle do not refer to deeds by parents to sons, but to transactions between other and less close relations. The principle would apply to transactions between a parent and his child forisfamiliar; but the authorities quoted above seem to show that there is no room for its application to a child *in familia*, and that nothing in the apparent onerosity of the transactions can, in such a case, remove the presumption that the parent's alienation is gratuitous. (See above, p. 117.)

(178.) After a lapse of time, the presumption of the gratuitous nature of the deed ceases to operate, but the reported cases do not afford the means of stating the precise length of time which will produce this effect.

In Spence v. creditors of Dick, 28th Nov. 1693, M. 1015, it was merely found, in reference to this point, that after the lapse of so long a period as forty years, the holders of the deed could not be called on to prove its onerosity. In the case of Blackwood v. Hamilton's creditors, 18th Jan. 1749, M. 904; and that of Elliot v. Elliot, 10th Nov. 1749, M. 905, the period elapsed was likewise upwards of forty years; but in neither case was an

analogy with the period of prescription taken as the ground of decision, nor was the period of forty years spoken of as the terminus from which the presumption of gratuitousness should cease. It was simply held that, "after so long a time," parties could not be called on to prove onerosity. See also Guthrie and Williamson v. Gordon, 2d Feb. 1711, M. 1020. In M'Kenzie v. Fletcher, 15th Jan. 1712, M. 924, where the creditor was an adjudger on a bond, the court "having balanced the inconveniences on all sides," repelled the reasons for reduction, "especially considering that [the adjudger] was *in mora*, not having adjudged the lands for seventeen years after the said disposition;" but this was entirely a case of specialties.

(179.) If the deed challenged be apparently part of a series of onerous transactions, it will still be open to the challenger to prove that it was in reality a gratuitous alienation.

See the cases cited above. It is difficult, however, to imagine such a case made out, without at the same time substantiating a forgery, or some specific fraudulent act, independently of that fraud *presumptio juris*, which is involved in the mere fact of an insolvent person conveying away his property.

(180.) On the other hand, in cases where the transaction is not, upon its face, removed from the presumption of gratuitousness, it is open to the holder to prove that it is onerous, and this he may do by proving, in the terms of the act, that it was granted either, 1st, for "true, just, and necessary causes;" or, 2d, for "a just price really paid."

In regard to the latter of these alternatives there can be little dispute, and there is no occasion to illustrate it;—it refers to *bond fide* sales or securities. It is of course open to proof, that the disguise of a *bond fide* sale has been fraudulently assumed to conceal a gratuitous alienation. As to the extent to which the possibility of having obtained a higher price will support the presumption that the price paid is insufficient, see Glencairn v. Brisbane, 16th Jan. 1677, M. 1011. The former class of onerous causes, however, admit of a farther division. Into,

1st, *Alienations in fulfilment of a prior obligation.*

2d, *Obligations or alienations, held onerous on account of their being the consideration for which another party has acted, or bound himself, e. g. cautionary obligations and marriage contracts.* And,

3d, *Alienations justified by the social obligation on the granter to provide for the receiver.*

(180.) *Fulfilment of prior Obligations.*—It is not neces-

sary that the deed should be such a one as the creditor could compel his debtor to grant: the requisite of onerosity is fulfilled if there existed any just claim on the granter, which the alienation will totally or partially implement.

In an old case, *Laird of Birkinbog v. Craigie*, 20th July 1671, M. 881, the consideration of the alienation was simply victual bought a month before its date, and not paid for. In *Ross v. Hutton and Henderson*, 15th June 1830, 8 S. 916, the insolvent conveyed certain goods to his brother and brother-in-law, who were his cautioners in a cash credit, which had been called up by the bank, and which the cautioners had to pay. This was held an onerous transfer. In the somewhat complex case of *Smith v. Wylie*, 6th March 1832, 10 S. 431, which, however, illustrates the same principle, it was found that the claim of a wife against her husband, for the expenses of an action of declarator, by which her right to be his wife was established against him, might be assigned for the benefit of her father, who had alimanted her, in such a manner as to be good against the creditors of her husband, who was insolvent. In the case of *Newman v. Preston*, 6th Jan. 1669, M. 880, an alienation, which was partly in satisfaction of previous debts, partly gratuitous, was sustained to the extent of the debts, and reduced in so far as it exceeded them. It may be presumed to be a necessary ingredient in onerosity, that the obligation to be fulfilled is a legal one. "Thus, if the ground of debt be *pactum illicitum*, as a smuggling transaction, or money lost at play, &c. it cannot be held as a just and necessary cause." 2 B. C. 189. It has to be observed, however, that many of those transactions, the onerosity of which removes them from the influence of this act, will be struck at by the act 1696. (See Book III.)

(181.) *Antenuptial Marriage Contracts*.—Deeds granted in contemplation of a marriage, whether by the parties who are to be married or their parents, and whether in favour of the intended husband and wife and their children, or of the principal parties without mention of children, are onerous, the solemnization of the marriage being the "just cause."

Gray, 10th Feb. 1674, M. 977; *Lockhart v. Dundas*, 14th Jan. 1714, M. 956; *Inglis v. Menzies*, 17th Feb. 1715, M. 981; *Blackburn v. Oliver*, 29th May 1816, F. C.; *Garden v. Stirling*, 26th Nov. 1822, 2 S. 39; *M'Lachlan v. Campbell*, 29th June 1824, 3 S. 192. There are no data for drawing a line as to the degree of relationship which will justify such a provision in contemplation of marriage. It cannot in the absence of better authority be safely said to extend beyond the parents. In a case, however,

which occurred early in the last century, such a provision, by an uncle to a nephew, was found to be onerous. *Thoirs' creditors v. Middleton*, 18th Nov. 1729, M. 984. Separate deeds or obligations will receive the same protection as formal antenuptial contracts. See the case of *Lockhart*, and the others cited above.

It may be inferred from one case, that if there be no appearance of fraud, an obligation in favour of one only of the contracting parties, and that party the child of the granter, will be held onerous. In *Scott v. Ross*, 12th June, 1822, 1 S. 480, a holograph letter, anterior to the marriage, by which the bridegroom's father became bound to pay him an annuity in consideration of his marriage, was allowed to rank on the sequestrated estate of the father, who was (as appears by the report to have been admitted) insolvent when he granted it. The ground on which the trustee had rejected the claim was, that as it "did not form part of the marriage contract, and was not in favour of the wife and children, it could not be held onerous." From an older decision, however, it is to be inferred, that if the provision be, in such a case, restricted to the grantee, "his heirs and assignees," and be not simply made over as part of the common fund, it will be reducible. *Hepburn v. Strathnaver*, 3d July 1712, M. 980. This was an assignation *in gremio* of the contract of marriage. The decisions do not afford the means of fixing limits to such provisions, or of explaining any criterion by which they can be pronounced to be within, or beyond the bounds which will be sanctioned by onerosity. This appears to be entirely a question of circumstances.

It would be, undoubtedly, quite contrary to the spirit of the law, that an insolvent person, by merely marrying under the provisions of an antenuptial contract, should be able to secure a provision to his wife, which should either be preferable to the claims of creditors, or entitled to rank along with them, according to the manner in which the estate is distributed. There seems to be a material difference in the equity of the case, according as the estate is distributed, though there can be none in strict law. If a provision be of such a character that it will rank in a sequestration, those in whose favour it stands will draw merely a dividend; while in the case of virtual bankruptcy, where there is no general distribution of the estate, they may, unless in so far as they may become assailable under the act 1696, or by some of the processes for equalizing diligence, obtain a clear preference, and may thus be the means of sweeping away the entire fund that might have been available for payment of the just creditors. There was a preference over such creditors in the case of *M'Lachlan v. Campbell*, 29th June 1824, 3 S. 192. The case is thus reported:—

"By antenuptial contract of marriage between the late Campbell of Barmulloch, (proprietor of an estate of about £300 per annum), and the claimant, Mrs M'Lachlan, (who brought him a tocher of £1000), she was provided, in the event of her survivance, with an annuity of £100; to be increased to £150 if

there were no heirs-male of the marriage. In a ranking of the estate after her husband's death, Mrs M'Lachlan claimed the full provision, there being no heirs-male. The common agent objected that, at the date of the marriage, Campbell was in such embarrassed circumstances that his free income, after paying the interest of his debts, only amounted to £40; and he contended that Mrs M'Lachlan's provision ought to be restricted. The Lord Ordinary, after an interim decree of preference, to the extent of £100, had been affirmed by the Court, found that the marriage-contract cannot be regarded as being, to any extent, objectionable at the instance of the creditors, and preferred her to the full amount of her jointure. The Court adhered.

"Their Lordships were of opinion, that unless the provision to a wife were exorbitant, it could not be cut down at the instance of the creditors; and that, in judging of this, the station of the wife and the fortune she brought, should chiefly be kept in view, rather than the private circumstances of the husband."

The ratio of this case probably brings us nearer to a fixed principle than that of any of the others which illustrate the subject. The onerosity of the husband's provision appears to have been measured by the addition made to the common fund by the wife. Perhaps this was the principle which ruled the decision in the case of *Buchanan v. Ferrier*, 14th Feb. 1822, 1 S. 322. In the case of *Duncan v. Sloss*, 8th Feb. 1785, M. 987, "the court restricted the jointure in question to a rational extent." Professor Bell says, (1 B. C. 637-8.) "Even in antenuptial contracts, if the husband is at the time insolvent, the provision to the wife will not be sustained beyond the limits of a reasonable and moderate allowance . . . But it would seem that this rule must be restricted to the case of a manifestly exorbitant provision; for a man, though truly insolvent, may appear to be in a situation where the provision made is moderate, and where, on that belief, the marriage has been contracted." It would seem a just converse of this doctrine, that no stipulations whatever in a marriage-contract will give one of the contracting parties a claim on the estate of another whom he knew to be insolvent at the time of executing the contract. In an old case, *Wood v. Reid*, 23d Nov. 1680, M. 977, there was so far a previous obligation on a father to portion his daughter, that there had been a provision for her in her mother's marriage-contract. The provision, however, was not secured; and, as he was notoriously bankrupt and in prison when his daughter was married, her husband could not found on an assignation in his favour.

A case is reported in which a father had handed over a sum of money to his son on the occasion of the son's marriage, a tocher being paid on the other side. It was found that, owing to its extravagant amount, the son became liable to repetition in favour of the creditors of the father. *Watt v. Campbell*, 8th Feb. 1671, M. 975.

(182.) The provisions to children in antenuptial con-

tracts are only onerous if they are to be paid during the father's lifetime; when they are payable on his decease, a child has only a *spes successionis*, which cannot interfere with the rights of creditors.

3 E. 8. 39. *Napier v. Irvine*, 24th July 1696, M. 12898; *Marshall's creditors*, 23d Dec. 1709, M. 12907; *Lockhart's creditors*, 31st July 1741, M. 12914; *Grahame v. Rome*, 24th Jan. 1677, M. 12887. The principle on which this has been generally thrown has been, that unless the child could raise action for fulfilment during the parent's lifetime, there is but a *spes successionis*, which cannot interfere with the claims of the creditors. According to analogy, when there is a fixed period for payment, such as marriage or majority, there is a *jus crediti* in favour of the child. As, however, the cases which admit this, are cases of competition with *subsequent* creditors, they are examined, in connexion with the common law right of creditors, to reduce, independently of statute (see above, p. 119,) and it has not been thought safe to infer that a party insolvent, by a marriage-contract, can, in any shape, make the children *nascituri* onerous creditors.

In the case of *Brown v. Govan*, 1st Feb. 1820, F. C., stated elsewhere, (p. 121,) it was alleged that the husband was insolvent when he signed the contract; but, the claim of the children being defeated on other grounds, it was not thought necessary to inquire as to the fact.

(183.) *A Cautionary Obligation* is generally stated as one of the deeds which would be considered onerous under the act. There is no real value for it put into the cautioner's pocket; but another party has given value for it, by giving credit to a third party, which he would not otherwise have given, or abstaining from the exercise against him of some legal power, which he would not otherwise have abstained from. This doctrine seems to have never been questioned, and no cases can be found bearing on it; but it seems to be a legitimate corollary from the decisions on marriage-contracts. It is laid down as law by Professor Bell, 2 B. C. 188. The doctrine of onerosity, in this department of the law, will naturally bear analogy with that of "consideration" in the English law of surety or guarantie. Suretyship is a contract, and to validate it under the statute of frauds, there must be a consideration on the one part, for the obligation incurred on the other. It constitutes a consideration that the party has either done something, or abstained from doing something in relation to a third party, in consequence of the guarantie. Thus, a simple promise to pay a debt already contracted by a third party, is not a guarantie granted "for a consideration," for the creditor has not allowed the debt to be incurred in consequence of it; but an obligation to see a creditor paid, on condition of his stopping execution, would be an obligation granted for a consideration.

See *Stapp v. Lill*, 1 Camp. 242. *Combe v. Woolf*, 8 Bing. 156. *Morley v. Boothby*, 3 Bing. 107. *Wain v. Walters*, 5 East, 10. *James v. Williams*, 5 B. & Adol. 1109. *Clancy v. Piggott*, 2 Ad. & Ell. 473.

(184.) *Alienations in fulfilment of Natural Obligations.*—Allusion has been already made to a class of alienations to conjunct persons, not struck at by the act,—those which are said to be rendered onerous by their being in fulfilment of a “natural obligation.” The use of this phraseology, pointing to an analogy between the case of a person bound by a civil obligation, and that of a person whom the law holds justified in making a provision for his dependent connexions, has a tendency to create confusion, and it is thought that the subject will be better kept clear of ambiguity by considering this justification of an alienation as one quite separate from the nature of a prior civil obligation. It is very difficult to extract from the decisions any fixed principles in relation to postnuptial contracts of marriage. Although they are frequently spoken of as partaking of the nature of contracts, they cannot, in strict law, be any farther than unilateral deeds; for, on the occurrence of the marriage, the property and expectations of the two parties are united in one stock, which is at the disposal of the husband. In so far as affects the claims of children, gratuitous deeds in their favour are considered elsewhere; (p. 115 *et seq.*) and it does not appear that the putting the alienation in the shape of a contract, between the husband and wife, can alter its essential nature, which is to give the children a mere subsidiary claim, posterior to that of onerous creditors prior or subsequent. Nor does it appear that it will affect the contract, that a third person, (such as the wife’s parent,) is a party to it, for, if he wishes to bestow on her a provision which shall be effectual against her husband’s creditors, the method of accomplishing this end is by excluding his *jus mariti*, 1 E. 6. 14. When it has once come into the common property, it is in the same position as if it had been added to it by the husband himself, or by the wife without condition. In *Murray Kynnymound’s creditors v. Murray Kynnymound*, 18th June 1746, M. 990, by postnuptial contract, the wife’s father had advanced a sum, granted bond for a farther sum, payable on his decease, and become bound to pay the children a sum on majority or marriage. The husband, on the other hand, settled a jointure on his wife, and made other provisions in favour of her and the children of the marriage. The clause on which the question depended was an obligation to pay a daughter (if there should be but one) £2000. The court “Found, that the provision of £2000 sterling, contracted by Hugh Murray, in his contract of marriage to the only daughter of the marriage, is reducible upon the act of Parliament 1621, in case it shall appear that Hugh Murray was insolvent at the date of the said contract.” This undoubtedly contains the principle set forth above, but it, at the same time, appears to have

weighed with the court in applying it, that the daughter who claimed this provision was heiress of an entailed estate.

(185.) *Postnuptial Contracts*.—In the case of provisions simply in favour of wives, granted in postnuptial contracts, the principle as expressed in the decisions is, that they are good “in so far as they do not exceed a reasonable provision;” but no rule has been created by which the onerosity of such provisions as against prior creditors can be tested, independently of the circumstances of each particular case.

Perhaps the nearest approach that can be made to a proper expression for the extent to which a provision may be made in such circumstances might be, that it is not to exceed an alimentary allowance. In *Campbell v. Campbell's creditors*, 26th July 1744, M. 988, a widower had married the governess of his children, and when he was insolvent, infest her in a liferent heritable bond of £100,—it was restricted to £50. “Some of the Lords,” says Kilkerran, who reports the case, “were of opinion, that where a woman marries without a contract, upon the faith of the legal provision, any postnuptial provision is a gratuitous deed, and, as such, reducible at the instance of prior creditors; and that, were it otherwise, there would be nothing to hinder any man who had married without a contract, after he knew himself insolvent, to settle a provision on his wife preferable to all his personal creditors.

“But the opinion which prevailed was, that marriage itself is an onerous cause, which yet will not be sufficient to sustain the provision any farther than what may be a moderate subsistence; for so far only the husband is under obligation. And as to the case supposed, of a husband's settling a provision upon his wife, after he knew himself become insolvent, even in that case it was thought the provision might be sustained *to the extent of a subsistence*.” In *Ferguson v. Swinton*, 2d Feb. 1796, M. 1001, the provision was £160 a-year; it was reduced by the court to £80. It appears that the wife had some separate property. In the case of *Nielson v. Austins*, 21st Nov. 1766, M. 998, where the marriage was clandestine and kept secret, and the claim on the husband's obligation came in the form of a competition for accumulated arrears, with the husband's creditors, the allowance, which was £30 per annum, was only sanctioned to the extent of £10 per annum.

There does not appear to be any reason for holding, on the principles which rule *donatio inter virum et uxorem*, that the postnuptial obligation of a solvent husband, should give any better right to a preference over creditors than that of an insolvent: or that either the relative proportion to each other of the funds brought by the husband and those brought by the wife to the common stock, or the circumstance of the postnuptial conven-

tional provisions bearing to be in lieu of the wife's legal provisions, ought to affect the question. Yet a comparatively late case is thus reported:—"Jeffrey, as trustee for the creditors of Campbell, brought an action for reducing a postnuptial contract of marriage, whereby Campbell had, about four years previous to his bankruptcy, settled certain heritable subjects on his wife and children. It was admitted that this property very little exceeded the value of the portion received with his wife; and the court, after an investigation of his solvency at the date of the contract, being satisfied that there was no fraud on his part, and that he had been perfectly solvent, adhered to the Lord Ordinary's interlocutor, repelling the reasons for reduction." *Jeffrey v. Campbell's Children*, 24th May 1825, 4 S. 32. This appears to open up the law on the subject of postnuptial contracts, and if it be a precedent to be followed, it will afford reason for holding, that a marriage no longer creates that union of the separate property of the parties into one stock, which it was formerly held to constitute; and that a husband and wife may (within certain limits) contract with each other as onerously as strangers. The ratio on which the decision proceeds seems to be, that the wife's tocher is a consideration, rendering any deed done by the husband in her favour, and bearing a just proportion to its amount, onerous. If this principle were established, it would naturally follow that the question of the husband's solvency would be an immaterial one, because, when a deed is onerous, insolvency is no objection to it. There are two old cases decided at a time when it certainly seems to have been a principle, that a postnuptial provision is onerous, so far as it is suitable to the condition of the parties. In these, accordingly, the provisions are supported in competition with previous creditors. *Walker v. Polwarth*, 19th June, 1635, M. 953, and *Stansfield v. Brown*, 19th Jan. 1676, M. 954. In a later case, *M'Lachlan v. Watson*, 6th July 1839, 1 D. 1177, in which the wife appears to have brought no tocher into the common fund, her right was so literally restricted to her antenuptial provisions, that a revocation of a condition in the antenuptial settlement, to the effect of reducing her provision if she married a second time, was considered gratuitous, and, on the widow having married a second time, was found to afford her only the claim of a legatee for the excess over the sum to which the provision had been so conditionally restricted. It was remarked from the bench, that the removal of the restriction was not made in a "postnuptial contract," though it does not appear that in a case where all the obligations must necessarily have been on one side, and the advantages on the other, the conversion of the transaction into the words of style adapted to a contract, should have altered its nature.

It is undoubtedly the case that the law has all along countenanced a distinction between *donatio inter virum et uxorem* and a postnuptial contract, in so far as respects the right of revocation. (1 St. 4. 18.) But here, as in the case of transactions between

fathers and children *in familia*, (see above, p. 116,) there may be every reason for making a deed which may be irrevocable as between the contracting parties inefficacious against creditors, a distinction having this circumstance for its justification, viz. That the wife's legal provisions for which such conventional provisions may be a substitute, or to which they may be an addition, are not liable to be affected by the gratuitous deeds of the husband, yet are not effectual against the claims of his onerous creditors. It must be admitted, however, that the court has shown a disposition to countenance the line of distinction between *donatio inter virum et uxorem* and a postnuptial contract even in questions with creditors. In *Kemp v. Napier*, 1st Feb. 1842, 4 D. 558, an annuity given by the husband to the wife during his life was held as *donatio*, and was reduced, because the creditors having taken all the husband's available rights, had taken his right to revoke the donation. Another annuity on the survivance of the wife, specially given in lieu of *jus relictæ* was found not to fall under the same rule. It was not ascertained whether the husband was insolvent at the time of granting, but as the inquiry could only affect the annuity on survivance, and it was useless to entertain this branch of the action, as the wife had pre-deceased, the inquiry was not entered on. A case which was lately considered at great length by the whole court, *Shearer v. Christie*, 18th Nov. 1842, 5 D. 132, bears mainly on this subject, though it is mixed up with some specialties which prevent it from bringing purely out the question how far a husband can contract with his wife, to the detriment of creditors. Circumstances were strongly in the wife's favour on grounds of equity, but the court, by a majority, found the contract ineffectual so far as the interests of creditors were concerned. Mary Kirby was the widow of John Fay, and succeeded to his moveables as executrix. She afterwards married William Shearer, who had no property, and who came to reside in the house occupied by her first husband, the furniture of which she had succeeded to as part of his moveables. Shearer granted a guarantie to Christie, and ten months afterwards a postnuptial contract was executed between him and his wife. The contract in the first place provided the moveables in communion to the longest liver. It next,—in consideration of Mary Kirby's first husband having left her the household furniture, of there being children of the first marriage, and of the second husband possessing no household furniture of his own, but living in the house occupied by the former husband, and furnished with his furniture,—on Shearer's part provided, "As I am satisfied that the meaning and intention of the said John Fay, in executing said testament in favour of the said Mary Kirby, was, that his furniture and effects should be applied towards the use of said family, I, the said W. S. do hereby renounce my *jus mariti* and right of management over said furniture and effects conform to an inventory thereof attached hereto, and subscribed by me as relative, and declare that said furniture and effects shall not be

liable to be attached for my obligations, or for any debts or deeds contracted, or to be contracted by me, but the same are and shall be as much the individual property of the said Mary Kirby as if she had remained the widow of the said John Fay, and had not entered upon a second marriage." Here the whole of the goods in communion had been the wife's. The husband came to her establishment, and had none of his own. The object of the contract was simply to give up that right of absorbing the whole possession of the other party which the letter of the law allowed him. There was much difference of opinion, but the strict interpretation of the law prevailed, and the renunciation of the *jus mariti* was found by a majority ineffectual against creditors. The chief circumstance which prevented this decision from purely bearing on the question of the efficacy of a postnuptial contract against creditors, was, that supposing a postnuptial deed capable of conveying property, the means of doing so had not been taken in this case, for there was no change in the possession of the subjects correspondent to the intended change of property, "A mere private agreement in words, whether oral or written, without any delivery or change of possession, or any thing equivalent to ordinary delivery, we think cannot be sufficient to pass the property of moveable goods out of the husband, and into the wife, to the exclusion of his right and his creditors. Now, in this case, it appears there was absolutely nothing of the kind. The writing was made out and signed, but nothing followed on it. The possession remained precisely where it was before, *i. e.* the possession of the husband, the master of the family." (Opinion of Lords President (Boyle,) Gillies, Mackenzie, Fullerton, Jeffrey, Cockburn, and Murray.) This, it may be remarked, bears on a subject pretty fully discussed elsewhere, (p. 116,) the difficulty of finding any means by which a father of a family having the administration of the moveable goods in communion, can make an effectual conveyance of them to a child or any other member of the family. It was remarked, upon the other hand, that if this were to be considered a mere renunciation of the *jus mariti*, it was not exercised at the proper time, for, to be effectual as to any particular subject, the *jus* ought to be resigned before that subject comes into the husband's hands; when the *jus mariti* has been exercised, by taking possession of the subject, the resignation is the giving up of a right already exercised. The question whether the husband was insolvent at the time of granting was only casually considered; the circumstances seem to leave no doubt of insolvency to this extent, that the alienation of the household furniture did not leave him the means of meeting his cautionary engagement; and this is such insolvency as renders a deed affectable by the act 1621.

SECT. 4.

CREDITORS ENTITLED TO THE BENEFIT OF
THE ACT.

(186.) *Previous Creditors.*—The right of challenging an alienation under the act 1621 is limited to those who were creditors of the alienator at the time of his making the alienation. Posterior creditors have a protection by the common law from the effects of latent and fraudulent deeds, but they have not in their favour the presumptions of the act 1621.

See above, p. 115. It is said that, by the terms of the act, “the only title necessary for maintaining a challenge of a conveyance made by the debtor is, that the pursuer be ‘a true creditor.’ There are no words requiring that his debt shall precede the alienation challenged.” (2 B. C. 183-4.) But the terms, “~~the~~ true and just creditor,” seem limitative, with reference to the previous clause describing the deeds struck at as posterior to the rights of “true creditors;” and practice has settled that posterior creditors only have the benefit of the act. (1 St. 9. 15; 4 E. 1. 44.) In *Mansfield v. Stuart*, 13th Feb. 1833, 11 S. 389, one of the reasons, in the Lord Ordinary’s note, for finding the deed not challengeable, was, that the impugner “does not allege that he is trustee for any creditor prior to the date of said bond.” See *Cunninghame & Others v. Hamilton*, 10th Jan. 1682, M. 902.

(187.) In reckoning its date, the debt is carried back to the time of its being contracted, and is not held to fall forward to the date when it is constituted by decree of a court, or when it becomes really exigible, or when it becomes embodied in a written document.

Thus, a creditor has the benefit of the act, though the time of payment may have been so far postponed as to be later than the date of the deed quarrelled; and though a document of debt should be later than the date of the gratuitous deed, the holder will have the benefit of the act, if the debt have been actually incurred at some date earlier than that of the gratuitous deed. *Pollock’s Creditors v. Pollock*, 21st Jan. 1669, M. 1002. *Street v. Masson, &c.* 27th July 1669, M. 1003.

(188.) A creditor whose claim was contingent before the date of the gratuitous alienation, has the benefit of the act on the contingency being purified.

E.g. A purchaser who has a claim on a warranty, a holder of

a bond of cautionry or letter of guarantie. See *Cathcart v. Glass*, 28th Nov. 1679, M. 1005. The creditor had here no farther claim than an implied warranty for the soundness of goods purchased. It is said that a contingent creditor, before the contingency is purified, is entitled to a declarator against an alienation, the effect being suspended until the contingency is purified. See Sir George M'Kenzie's Works, ii. 10; 2 B. C. 185.

Shearer v. Christie, 18th Nov. 1842, 1 D. 132, (see above, p. 152.) was a case of guarantie. It does not, perhaps, fully illustrate the act 1621, because the alienation, being between husband and wife, did not (it may be urged) require that the creditor's debt should be prior; but it is plainly inferrible, that a guarantie will constitute a foundation for a reduction. The extent, however, to which this doctrine could be legitimately carried, may be matter of curious inquiry. Is a cautioner for intromissions,—a cautioner, for instance, of a bank agent,—so situated, from the moment of his signing the bond of cautionry, that whatever liabilities he may incur shall retroact, and render gratuitous alienations reducible in the case of the obligation rendering him insolvent? or shall the point from which the debt shall run against him be the time when the defalcation which he has to make good has occurred? Does the drawer of a bill for value which is discounted and dishonoured, become, from the date of the drawing, a debtor subject to the application of the act? An additional element of difficulty in the settlement of such points, is the consideration, that in calculating the question of insolvency, the estate, both of the cautioner and the party for whom he is security, should be considered; and it would seem right, that the estate of the latter, no more than that of the former, should be considered in reference to its amount, when the obligation is enforced, but in reference to its amount at the time when the deed under challenge is executed. See *Brown v. Campbell*, 9th Jan. 1696, M. 1055.

(189.) *Bills*.—It has been decided, that the undated acceptance of a bill is not to be presumed as of the date of the drawing, so as to constitute the drawer a creditor on that day. On the other hand, it has been decided, that an undated indorsation is presumed to be of the date of the bill.

The former was decided in *Man v. Walls*, 25th July 1702, M. 1006. Professor Bell and Mr Thomson both consider this a questionable precedent, (2 B. C. 185; Th. on B. 67.) The circumstances were peculiar; for the bill was drawn on the day on which the deed impugned (not on the act 1621, but on the act 1696) was executed. The presumption of the indorsation being of the date of the bill, was in the *Thistle Bank v. Lenny*, 14th May 1794, 2 B. C. 185; Th. on B. 67.

(190.) *Gratuitous creditors*.—It is matter of doubt how far a

gratuitous creditor (viz. one to whom an alienation has been made without value) has the benefit of the act against a posterior gratuitous donee. Sir George Mackenzie thinks such a creditor has the benefit of the act, (Works, ii. 10,) and Professor Bell is of the same opinion, (2 B. C. 185,) founding on the case of *Alexander v. Lundie*, 15th July 1675, M. 940. Perhaps this case might be held to mark the extent to which a gratuitous creditor is protected against subsequent gratuitous creditors. It was an instance of a double assignment of a special subject. When a subject is conveyed, although gratuitously, the first alienation will, in a competition, be preferable to the second. It would certainly, however, be a more doubtful matter, if a general pecuniary obligation should be a ground for the reduction of a posterior special conveyance, although the latter might have the effect of preventing the former from being fulfilled.

(191.) *A trustee* for creditors may pursue under the act, if he represent any creditors anterior to the deed impugned.

Mansfield v. Stuart, 13th Feb. 1833, 11 S. 389. *Jeffrey v. Campbell's Children*, 24th May 1825, 4 S. 32. Several of the cases referred to above are illustrations of trustees pursuing under the act.

SECT. 5.

EXCEPTION IN FAVOUR OF ONEROUS ACQUIRERS.

(192.) Persons who have fairly purchased from a conjunct or confident person the property alienated to him, or who have acquired it in satisfaction of lawful debt, are protected from the nullity of the act, the receiver of the price being liable in damages.

The words are, "In case any of his majestie's good subjectes (no wayes partakers of the saids fraudes) have lawfully purchased any of the saids bankrupts' landes or goods, by true bargaines, for just and competent pryces, or in satisfaction of their lawful debts, from the interposed persons, trusted by the saids dyvours. In that case, the right lawfully acquired by him who is no wayes partaker of the fraude, shall not be annulled in manner foresaid; but the receiver of the pryce of the saids lands, goods, and others, from the buyer, shall be holden and oblised to make the same forthcomming to the behoove of the bankruptes' trew creditors, in payment of their lawful debts."

(193.) An alienation, however, bearing on its face that it is to a conjunct person, and that it is for no, or for an insufficient, onerous cause, is not protected in the hands of a third party, though he may have obtained it for value.

Hay v. Jamison, 6th Feb. 1672, M. 1009. The alienation was a lease, and the court, specially inspecting it, found it to bear on its face that it was gratuitous. Gordon v. Ferguson, 23d Dec. 1679, M. 1012. It may be inferred from some of the authorities, that if the deed bear on its face to be to a conjunct person, although it likewise bear on its face to be for a cause onerous, yet the knowledge conveyed to the third party receiver, that it is to a person conjunct, is to be held a warning to him to satisfy himself of the onerosity, and a sufficient ground for reduction, if the deed be not originally onerous. Thus, in Crawford v. Ker, 24th Jan. 1680, M. 1012, the deed, which was to a brother-in-law, bore on its face to be for a cause onerous, but the holder was held bound to instruct the onerosity. Fountainhall says, "This interlocutor offended many, and the Lords resolved to reconsider it." He says, "The Lords afterwards mitigated this interlocutor." See the opinions in Spence v. Dick's Creditors, 2d Dec. 1692, M. 1014; Leslie v. Leslie's Creditors, 15th June 1710, M. 1018. In Allan v. Thomson, 9th Jan. 1730, M. 1022, the deed was not reduced, though the person to whom the conjunct person disposed the property was his own daughter, because her title did not instruct the source from which the right had originally sprung. It was observed, that nothing was more likely than that the holder of the deed knew of its having originally been granted to a conjunct person; but as the fact did not appear on the face of her writs, it was not to be presumed against her, but must be proved.

There are no cases showing a like presumption to this, in relation to confident persons, and analogy from the cases applicable to conjunct persons, does not support the inference, that deeds to confident persons, bearing for causes onerous, are reducible in the hands of third parties without extraneous proof. The reason for this distinction will be pretty obvious. The connexion which makes a person confident to another, arises out of a train of circumstances of which the transaction connected with the granting of the deed will generally be one; and it would be difficult to define any method of describing a donee which should, *presumptione juris*, publish to all who see the deed, that he is a confident person. On the other hand, the relation of a conjunct person is one which admits of very easy and simple description on the face of the deed. It may be here observed, that a practice seems to have been adopted in the old decisions referable to the presumption in relation to conjunct persons, which the altered state of society would prevent from being safely applicable at the present day. There was so little property in the country, that those who had any to dispose of were well known; and when a cedent's name appeared on a deed, it seems never to

have been doubted that every one who saw it would know who he was, and whether or not he was related to the assignee. Such a presumption would not now be just, and therefore, if the principle of these old decisions were adopted, it would seem right to restrict it to the effect of presuming *mala fides* against a third party who holds of a conjunct person only when *the relationship* of the parties is set forth in the deed.

SECT. 6.

ALIENATIONS IN PREJUDICE OF BEGUN DILIGENCE.

(194.) A creditor who has inhibited his debtor, or who has begun diligence to attach any part of his estate, cannot be defeated by a gratuitous alienation, and the person to whom it is alienated is held to obtain it for such creditor's behoof.

By the second branch of the act 1621, "If any of the saids dyvours, or their interposed partakers of their fraude, shall make any voluntarie payment or right to any persone, in defraude of the lawful and more timely diligence of another creditor, having served inhibition, or used horning, arreastment, comprizing, or other lawful meane, duely to affect the dyvour's lands or goods, or price thereof to his behoove. In that case the said dyvour, or interposed person, shall be holden to make the same forthcoming to the creditor having used his first lawful diligence."

(195.) An executed inhibition is sufficient diligence to found a reduction under this clause, without publication and registration, where the deed challenged is the alienation of a subject affected by the inhibition.

Gartshore v. Cockburn, 16th March 1686, M. 1051; *Brown v. Campbell*, 9th Jan. 1696, M. 1055. In *Dalrymple v. Lyell*, 25th Nov. 1687, M. 1052, it was declared (but not found, as the decision rested on other grounds,) that inhibition was "a due diligence, to hinder gratification out of moveables;" but this is an isolated precedent not likely to be followed.

"*Adjudication*," as Professor Bell remarks, "needs no assistance from the statute, for with the citation the *vitium litigiosum* begins at common law." (2 B. C. 200.)

(196.) A charge on letters of horning, without registration or denunciation, is sufficient to found a reduction of

a subsequent alienation of moveable property; and a charge on an extracted warrant, in terms of the late act for regulating diligence, will have the same effect.

1 and 2 Vict. c. 114, §§ 3, 35. 4 E. 1. 39. *Bank of Scotland v. Kennedy*, 23d Dec. 1708, M. 1057; *Hamilton, &c. v. Campbell*, 23d Feb. 1709, M. 1059; *Grant v. M'Edward's Trustees*, 6th Feb. 1835, 13 S. 424. According to the older law, a previous charge of horning afforded a ground for the reduction of an heritable right, but it is doubted if this be now law. *Murray v. Drummond*, 18th July, 1677, M. 1048; *Bathgate v. Bowdoun*, 25th Jan. 1681, M. 1049; 4 E. 1. 39. Professor Bell remarks, that "There is no case to be found since the abolition of escheat as a consequence of civil rebellion, in which, upon the footing of this statute, a reduction has been tried of an heritable right, by a creditor who had merely denounced his debtor in a horning," (2 B. C. 200;) and he inferred, that it was from the circumstance of its being, as a step towards civil rebellion and escheat, the preliminary of a species of real diligence, that it was held to affect the heritable estate.

(197.) *Formal diligence*.—To give the creditor the privileges of the act, the diligence, so far as it has been pursued, must be formal and valid, and such as, if carried on, would effectually attach the subject against which it is aimed.

Cockburn v. Miln, &c. Feb. 1686, M. 1051; *Duff v. Bell's Representatives*, 22d July, 1742, M. 1059.

(198.) *Delay*.—It has been decided, that where the creditor delays his diligence, he loses the right to impugn intervening alienations; but the particular length of time which, in relation to any class of diligence, will be held delay to such effect, has not been fixed.

Gordon v. Duff, 1707, M. 1078; *Drummond v. Kennedy*, 9th July, 1709, M. 1079; *Duff v. Bell's Representatives*, 22d July, 1742, M. 1059. The initial steps of diligence do not continuously tie up the debtor's hands, as if a security were held over the estate affected by the diligence. The object of the statute is to prevent debtors from fraudulently removing the subjects which their creditors are taking such means as the law gives, for attaching. In all the cases cited above, the question of delay was mixed up with other matters. Moreover, there are two elements in the *mora*, the influence of which has not been properly distinguished,—The length of time intervening between the date of the step taken in the diligence, and that of the execution of the alienation impugned; and the interval between the date of the step in dili-

gence, and that of the next succeeding step. In the last cited case, three months elapsed between the step of the diligence and the granting of the alienation; but eight years elapsed before farther steps were taken in the diligence; and it does not appear very distinctly to which of these periods the *mora* was attributed. If effect be given to delay anterior to the granting of the alienation, it will be of the nature of an expiry of the embargo which interfered with the debtor's free use of his property. If effect be given to delay supervening on the alienation, it will be of the nature of a prescription in favour of the alienation. Where a charge had been given on the 15th August, and the impugned alienation was executed on the 26th, and denunciation and registration dated 8th September, the alienation was reduced; but it was noticed from the bench, that the creditor who did this diligence "seemed *in mora* in forbearing to denounce." Bateman, &c. v. Hamilton, 27th January, 1686, M. 1076. In Drummond's case, it was pleaded, that as the interval between the charge and the alienation was not sufficient to constitute *mora*, the assignation being null, could not be validated by the delay of five months before denunciation. The Court, however, did not accept of this plea.

(199.) *Insolvency*.—The insolvency of the granter at the time of granting the deed, is necessary to the reduction on this as on the other branch of the act.

In Cockburn v. Ross, 12th February, 1686, M. 1046, it appears to have been held that the presumption in the case of a person under diligence is known insolvency; and that it lies with the assignee to prove that the cedent was "holden and reputed to be solvent." See Bank of Scotland v. Kennedy, 24th Feb. 1709, M. 1058. Decisions, however, are inconsistent with each other in respect to the burden of proof. See Miln v. Nicolson's Creditors, 10th Nov. 1697, M. 1046; Tweedie v. Din, 7th June 1715, M. 1037. And they are only uniform in showing, that it is the *reputation*, and not the *fact* of solvency or insolvency, that is the subject of inquiry, on the ground apparently that the validity of the alienation depends on the *bona fides* of the creditor recipient. In Miln's case, as above, proof of insolvency was held sufficient in a question whether it was necessary to prove notour bankruptcy. It is difficult to say whether it was intended by the decision that *actual* insolvency, without its being known, is a ground of reduction. Perhaps the decisions may be reconciled by holding that the diligence throws the probaton of *reputed* solvency on the assignee; but that where there is reputed solvency, it is still open to the creditor to prove *actual* insolvency.

(200.) *Onerous Deeds, &c.*—Under this branch of the

act, although its application to other onerous transactions is not fixed, property which the debtor has handed over to a creditor while under the pressure of his diligence, and for the purpose of satisfying it, cannot be revindicated; nor can a creditor be interfered with in taking steps to complete a right he may have previously obtained, as by taking infestment.

Creditors of Hunter competing, 9th Jan. 1695, M. 1023; Gordon v. Bogle, 19th Feb. 1724, M. 1041.

Previous Obligation.

(201.) It is questionable if the exception in the first part of the statute, of deeds done for a true, just, or necessary cause, extends to the second branch. The taking of sasine by a disponee, or the intimation of an assignation by an assignee, is not struck at, because it is not the act of the debtor himself. Professor Bell says—"Sir George M'Kenzie contends, that all deeds to which the debtor was not actually compelled, should be objectionable, notwithstanding any previous obligation to grant them. But this does not appear to be law." (2 B. C. 202.) Later inquiries, however, have tended to confirm Sir George M'Kenzie's view. Professor Bell refers to the case of Grant v. Grant, 10th Nov. 1748, M. 951, as reported by Kilkerran, who says—"On this occasion there was some reasoning among the lords upon the construction of the act 1621; wherein they agreed that the words, *necessary causes*, are in practice thus understood, that there be a previous obligation to grant the deed; that though the words, *true, just, and necessary causes*, would appear, as they stand, to be conjunctive, they have always been considered as *disjunctive*," &c. It is shown, however, in the opinion by Lords Gillies, Mackenzie, Medwyn, and Corehouse, in Mansfield v. Walker's Trustees, 28th June 1833, 11 S. 813, from reference to Elchie's report, (*voce* Fraud, No. 19,) that this note of Kilkerran refers to the *first* part of the act. Their lordships' opinion continues,—“There is the uncontradicted authority of Sir George M'Kenzie, that the term ‘voluntary’ in the second branch of the act 1621, does not signify deeds granted *proprio motu* only, but those also which are granted in implement of a previous obligation. Bankton lays down the same doctrine expressly, and Erskine by implication; and there is a decision to that effect, Peat v. Beg.” It may be remarked, however, that this case (reported M. 13311) does not distinctly bear on the act. It was a question whether certain lands should be struck out of a ranking and sale, as carried by a disposition following on a roup. “The lords, moved principally by the latency of the roup, refused to strike the lands out of the sale.” It appears that a deed which gives a creditor more effectual means of recovering a debt than its former constitution afforded

him, is impugnable—as, where a variety of miscellaneous debts, by bill and otherwise, were, with interest, accumulated in a bond of corroboration. *Dunbar's Creditors v. Grant*, 18th June 1793, M. 1027. Here “a great majority of the court were of opinion that a bankrupt ought to execute no deed by which the situation of his creditors is affected, and that it would be dangerous to support any deed of that nature.” See *Dalglish v. Gibson*, 9th July 1709, M. 1035.

(202.) A trust-deed for behoof of creditors generally, is reducible under this branch of the act, at the instance of the creditor whose diligence is prejudiced.

Grant v. M'Edward's trustees, 6th Feb. 1835, 13 S. 424. Here, the debtor having been in prison, had promised to pay his creditors a composition; but the pursuer was no party to the arrangement. The pursuer had charged the debtor on a bill. On the 15th April the latter wrote, requesting delay, and promising an arrangement for payment. Proceedings were accordingly suspended until the 21st; but on the 19th the trust-deed was executed, and possession taken by the trustees, who resisted execution. The case of *Wyld, &c. v. Hannah, &c.*, 8th Feb. 1828, 6 S. 510, might seem in contradiction to the above decision. The charge had taken place on the 20th, a trust-deed was executed on the 25th, and the trustees took possession. The decision was in favour of the trustees. In reference to this case, it was observed from the bench, in that of *Grant*, that “the difference was that in it [*Wyld's case*] there was no reduction; while here there is.” It must be noticed, however, that the court seemed in some measure to rely on the fact of the proceedings in *Grant's case* showing collusion.

(203.) *Money Payment*.—Although the act specially mentions “any voluntarie payment;” yet it has been fixed in practice that a payment of money to a creditor cannot be impugned by another doing diligence.

Forbes v. Brebner, 26th Jan. 1751, M. 1042, 1128; 2 B. C. 201. This rule seems to rest on the reason, that the act is to be construed as protecting to the active creditor only such property as his diligence can affect; while money in the pocket is not affectable by any class of diligence.

SECT. 7.

METHOD OF ENFORCING THE ACT.

(204.) It is declared by the statute, that the alienations coming under its operations shall be “null, and of none avail, force, strength, or effect, by way of action, exception, or reply, without any farther declarator;” a rule which, if strictly interpreted,

would render such a deed, like a document not stamped according to the stamp-laws, or an obligation contaminated by a usurious consideration according to the older law of usury, void, and not a document which could be founded on in any court of justice. Such a rule, however, sanctioning a nullity which, far from appearing on the face of the document, required to be established by a train of evidence and presumptions, was found quite incompatible with practice; and Sir George Mackenzie says, he found that "the nullity arising from this act is oftentimes received only by way of reduction; whereby the lords have receded from the express words of the law," (Works, ii. 24.) There is a case contemporary with this writer, in which the plea seems to have been allowed in exception, *Bowers v. Cowper*, 16th July 1671, M. 2734. The alienation questioned was an assignation or disposition of moveables. It was pleaded, that "notwithstanding of the tenor of the said act, the lords did not sustain that nullity by way of exception or reply." But "the lords found the nullity competent by way of exception; it being no heritable right requiring the production of author's rights." In the still earlier case of *Simes v. Brown*, 5th Jan. 1669, M. 2733, the court considered, "that albeit in form the bond should have been reduced," "yet, now the matter being before the lords, and the parties poor," they found the deed null "without the necessity of reduction, the matter being but a personal right;" and see *Napier v. Gordon*, 12th Feb. 1670, M. 3755.

The view taken by Sir George Mackenzie, however, has been confirmed by later practice, which requires the impugnement to be by action, see 2 B. C. 194. Reduction is the proper form, where the alienation is by writ; and it would perhaps be impossible to find any late case where the act has been given effect to in any other form. It was observed in Grant's case, as above, (p. 161,) that the question in Wyld's case should have been brought in the form of a reduction. Where the alienation consists in the delivery of moveables, a simple action of restitution would seem to be not incompatible. Mr Thomson says, "As the statute is in the form of an act of sederunt of the Court of Session, made for regulating *their own* judgments, and simply ratified by parliament, an action under it is not competent, unless before the Court of Session." Th. on Bills, 681. But supposing the form of action to be one of mere restitution, and not as above, reduction, or any form privative to the Court of Session, an inferior judge could hardly refuse obedience to a statute not in desuetude, on any ground connected with the manner in which the statute came into existence.

CHAPTER III.

EFFECTS OF INSOLVENCY ON QUESTIONS OF DELIVERY.

SECT. I.—AN INSOLVENT VENDER AND THE EFFECTS
UNDELIVERED.

(205.) When goods are sold, but are not delivered, their property is still in the vender. If, by the operation of the bankrupt laws, he should cease to have the right of disposal of them before delivery, they will belong to the creditors at large; and, if the vendee have paid the price, or any part of it, he will only be entitled to rank as a creditor for the money he has advanced.

Paul v. Cuthbertson, 3d July 1840, 2 D. 1286. Boak v. Megget, 3d Feb. 1844, 6 D. 662.—This rule is illustrated by several of the cases in the following pages. It is founded on the distinctive principle of the law of sale in Scotland, by which, though the contract be completed, the subject is not, as it is in England, the property of the vendee.

Inquiry whether mere Insolvency bars Delivery.

(206.) The following questions appear not to have been fixed either by statute or decisions. In what circumstances is a merchant's, or other vender's estate, so tied up that he ceases to be the administrator of it, and is not entitled to deliver the commodities which have been purchased from him and paid for? In what respects is his ability to make such delivery more limited than his ability to pay his debts with the money that may be in his possession? And, at the point where the vender is not entitled to proffer delivery of the goods, has his estate so changed its position and become the property of his creditors, that the vendee cannot take delivery himself? In the first place, a gratuitous alienation to a conjunct and confident person, or a conveyance in defraud of prior diligence, is struck at by the act 1621; but under neither of these alternatives does it affect the completion of a sale by delivery. Next, a preference to a creditor is struck at by the act 1696, if it be within sixty days of bankruptcy. How far delivery of goods purchased comes within the act is considered elsewhere, (Book III. Chap. II.) But there is one principle in the operation of this act which has to be specially noticed here. It is the intention of the debtor, and not that of the creditor, which brings the transaction within the act, and, therefore, if it did apply to the case of the vender sending the paid for goods to the purchaser, it would not apply to the case of the vendee himself removing them, (Book III. Chap. II. § 1.) When

we come to the state of notour bankruptcy, this does not alter matters—the state of notour bankruptcy only acts through the operation of the act 1696; and, if the transaction be good within sixty days before the bankruptcy, it is equally good after it. In England, the law is so far different that the act of bankruptcy is the point of time from which (unless in the case of statutory exceptions) the tying up of the estate takes place, and thus the classes of transactions which with us are bad, some of them from the commencement of sixty days before bankruptcy, and others from the date of sequestration, are, in England, all held bad from the one point of bankruptcy, unless they are specially validated by exceptions from the act. It appears to have been on the analogy of this system—one totally distinct from our own—that an attempt has been made to set up insolvency as a third barrier. Passing from the act 1696, the next ground of invalidation of the acts of a commercial man is sequestration. Here his hands are, for the first time, effectually tied up, not merely by the invalidation of this or that special act, but by his being entirely deprived of the management of his business and estate.

In various instances, attempts have been made to set up a rule of law to the effect, that “from the moment of insolvency, the debtor loses the power of a proprietor, and becomes a mere *negotiorum gestor* for his creditors in the management of the common fund.” (1 B. C. 8.) In the first place, we have no statute fixing such a doctrine. If it had been fixed by statute we would have had some criterion of the time when insolvency should be said to commence. In the remarks on the case of Broughton, as noticed below, the calling of a meeting of creditors was held to be a proclamation of insolvency. But to other cases other criterions would have to be applied; and the question, what is insolvency? is one which, in this sense, our best lawyers have not been able to answer. It is true that the act 1621 does not tell us what is to be held equivalent to insolvency for its purposes, or what is the point of time at which it shall be held to commence; but on the concurrence of the circumstances which admit of the operation of that act, there are presumptions against the solvency of the debtor, which could not be, with safety, admitted in commercial matters, unless some juncture were fixed by statute, which should attach the presumption. No one will deny the strength of the presumption when a merchant stops payment, and calls a meeting of his creditors; but when the circumstances are less conclusive as respects the public evidence, the merchant may be known to be as hopelessly insolvent. The application of English cases to this subject has, in addition to the above, other elements of dubiety in this circumstance, that many of those acts which we are accustomed in Scotland to consider the strongest indications of insolvency, are there specific acts of bankruptcy, placing the debtor in a parallel position as to transactions in general, to that in which he would be placed by notour bankruptcy as to transactions coming under

the act 1696. Thus, by 6 Geo. IV. c. 16, § 3, "If any such trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house," &c. "with intent to defeat or delay his creditors," he "shall be deemed to have thereby committed an act of bankruptcy." These are all brief expressions which, by long practice, have been applied to the various means by which a trader shows his inability to pay his debts. Thus, when a debtor is said to "keep house," he has denied himself to a creditor, knowing the person to be a creditor, that he may avoid importunity. In connexion with this clause, sect. 72 operates by enacting, "That if any bankrupt, *at the time he becomes bankrupt*, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to dispose of the same for the benefit of the creditors under the commission." Such a clause was necessary in England, where a completed sale is a transfer of the property, and where, consequently, the effects have ceased to be the seller's property before his act of bankruptcy is committed. Here, then, in the case of the seller of goods which have been paid for, there are two very palpable facts necessary to fix the goods as part of the bankrupt estate; 1st, That they continued in his reputed ownership up to the time when he committed an act of bankruptcy; and, 2d, That they should have so continued with the buyer's consent. It does not appear that in the interpretation of the act, reputed ownership and non-delivery are synonymous terms; and that the same thing which is, under the bankrupt act, the giving up of reputed ownership, would be with us a delivery to vest the subject in the vendee. It is said that the usage of trade will take the goods out of the reputed ownership of the bankrupt, though they are in his warerooms, (Smith's Mercantile Law, 658.) In *Thackthwaite v. Cock*, 3 Taunt. 487, where hops unmarked remained with the seller at a rent till the purchaser should call for them, it was maintained that this was in pursuance of the usage of the hop trade; but the court would not allow a usage which carried in it no means of distinguishing the sold from the unsold property, to operate as a custom of trade in a matter where its essential should be that it made some distinction. Where the purchaser from a wine merchant transferred the wine to a particular binn in the vender's cellar, sealed it, and had an entry to correspond made in the vender's books, the statute was held not to apply, *ex parte* Marrable, 13th April 1824, 1 G. & J. 402; so in *Carruthers v. Payne*, 27th Nov. 1828, 5 Bingh. 270, where a carriage having been made and paid for, and an alteration being wanted, and delivery with the alteration frequently demanded, it was found not to be in the order and disposition of the maker.

The law of England, on this point, is thus precise, the only

difficulty being as to what facts constitute reputed ownership; and this is a point which will go to a jury for decision. The act of bankruptcy is the turning point at which the property comes into the bankrupt estate, if it remain where it was with the purchaser's consent. If the purchaser has not consented,—if, for instance, he has gone on the day before and attempted to remove it,—it will not be part of the bankrupt estate.

In Scotland, though the subject is, as already said, open to much dispute, the course of the decisions seems to show that there is nothing in mere insolvency to make goods which are bought and paid for, but which remain in the insolvent's custody, part of his bankrupt estate, if he should afterwards be sequestrated. In the celebrated case of *Broughton v. Aitchison*, 15th Nov. 1809, F. C., M. Syn. 681, after payment had been made, the sellers stopped payment, intimating this resolution to their creditors; but they were under no diligence. A meeting of creditors was held, and, on the following day, the purchasers demanded delivery of their wheat, which was in warerooms of which the venders possessed the key. The purchasers took protest, that if delivery were not made they would apply summarily to the sheriff. They did apply summarily; and between the application and an awarding in favour of the purchasers, sequestration was awarded of the vender's estate. The decision was in favour of the purchaser. This decision has been much questioned, 1 B. C. 180, M. Syn. 686. The high authority of President Blair was against it, and he was reported to have said, that "it was from the date of apparent insolvency, not the date of sequestration, that all transactions stopped. The claims of creditors remained as they stood on that day. Was, then, the property of the wheat transferred on that day? The fact that the price was paid made no difference. This will appear by supposing the case reversed. Suppose that Crow and Wood were solvent, Aitchison insolvent, and the price not paid. Aitchison's creditors could not have demanded the wheat, offering only a dividend for the price. Yet the state of the matter, as to delivery, is, by the supposition, the same in both cases. The fact relative to price must be laid out of view. Delivery or not is the point upon which the matter depends." So far as it refers to the subject under discussion, this is an opinion which the subsequent progress of the law has been fully more in contradiction than in favour of. In connexion with the latter clause of the opinion, see below, Sect. 2. In the case of *Lang v. Bruce*, 7th July 1832, 10 S. 777, the question came to be reconsidered in almost similar circumstances. The purchase was of cattle, for which the seller had got the purchaser's bills. Whether the cattle were effectually delivered, at the time of the sale, is a question which will be considered in the ensuing section. What is essential to the present inquiry is, that before the purchaser had got a portion of the cattle out of the premises of the seller, the law agent of the latter addressed a circular to his creditors, requesting them to meet, "in consequence of embarrassments, which, it is hoped, will be only temporary." In the meantime, and before

the meeting was held, the purchaser went to drive away his cattle, but was resisted by the seller's servants; not, it appears, under the instructions of the seller, but as acting for the creditors. The buyer then intimated to the agent for the creditors, that he meant to apply to the sheriff for authority to drive off his cattle, unless he received an order for delivery; adding, that he was ready to find security for the payment of his bills. There was some discussion as to what security he was to find; but, in the end, by the instruction of the creditors, he was refused permission to drive off the cattle. A petition was, in consequence, presented to the sheriff. There was a variety of procedure in the inferior court; and, during its progress, sequestration of the seller's estate was awarded. Of the state in which the question stood at the commencement of the sequestration, or of the subsequent proceedings in the petitory action in the inferior court, it is unnecessary to give any details; because, if the buyer was entitled to drive away his cattle at the time between the calling of the meeting and the awarding of sequestration, the circumstance that the judicial procedure for making good his right was not completed at that juncture, would have no effect on the reality of his right. When the case came on for the opinion of the whole judges, Lords Glenlee, Cringletie, Fullerton, and Moncreiff, in reference to this part of the case, said,

"The proposition maintained by the defender, in this part of the case, seems to be, that mere insolvency, or, at all events, insolvency in any manner declared, deprives a man of all power of dealing with his property; and from this he infers, that even where goods have been sold and the price paid, it is incompetent for him to give, or the purchaser to take delivery.

"*We are not prepared to assent to this doctrine.* Excepting one dictum of an eminent judge, [Lord President Blair, as above,] standing opposed to the judgment in the case in which it was delivered, and in the reports of which we strongly apprehend there must be some mistake, we have seen no authority for giving so strong an effect to mere insolvency, without either diligence or sequestration." And, farther on,

"The question is, what legal answer could be made to a man who had purchased stock at a public auction, who had paid the price, taken delivery of a part of the animals, and been resisted in removing the rest, and who now demanded from the sheriff an order on the vender, not being legally bankrupt, to deliver the remainder? We can see no good answer, and therefore we conclude that he was entitled to the decree of the sheriff, which he obtained in the first instance; and being of this opinion, we think that this case is the same as it would have been if the cattle and ewes had been actually taken away from the field at the time when the pursuer first went for the purpose, and was resisted." This doctrine was agreed to by three of the other judges; but on the other hand, seven of the judges concurred in an opinion in which it was held—

“ We are disposed to concur in the law as laid down by the late Lord President Blair, in the case of Broughton against Aitchisons,—namely, that after proclaimed insolvency, the bankrupt can legally do no act to affect or change the rights of his creditors, *inter se*. Having called them together for the purpose of placing the administration of his affairs in their hands in order to their payment, he cannot be suffered afterwards to do any thing which either has the effect of benefiting the general body at the expense of an individual creditor, or which gives to an individual a preference to which, in the distribution, he would otherwise have had no right; and as the wrong thus committed is done, not for the benefit of the bankrupt himself, who can in general have no interest individually in the matter, but to serve that of the creditors meant to be favoured, they are not entitled to profit by what has been done in their behoof.”

It is to be observed here that the criterion is not made insolvency—it is applied to the circumstances of the individual case, and laid on the calling together of the creditors. It might be answered, that when a bankrupt and creditors set about an extrajudicial arrangement, by meetings, communings, &c. delaying recourse to the statutory methods of distributing the estate, they must be held to place some reliance on each other; and cannot expect to be invested in their voluntary proceedings, with the remedies provided for the enforcement of the statutory procedure. Undoubtedly, an insolvent person may, in such circumstances, do an act against which his creditors have legal redress; but it will be under the act 1621, or the act 1696, that they would obtain it; and when the insolvent (who must be supposed to do something with his property until it is taken out of his hands) in his discretion gives delivery or pays a debt, the question will be, whether the act is reducible by either of these statutes, or is not. In order to bring out a decision in this case, one of the judges abstained from voting, leaving a majority of one for the purchaser. It was hoped that the question would come for final settlement before the House of Lords; but it was adjusted out of court.

The subsequent case of *Gibson v. Forbes*, 9th July 1833, 11 S. 916, which is noticed at length farther on, involved the question of delivery after insolvency; but it was under the act 1696. On that occasion, however, Lord Craigie gave as his opinion, “ that after bankruptcy, the law only, and not any act performed by the common debtor, must govern the rights and preferences of the creditors; and it is of no importance whether the bankruptcy is that defined by the statutes, or public insolvency, or insolvency known to those who are participant in the transaction out of which the challenge arises.

SECT. 2.

DELIVERY OF GOODS IN QUESTIONS WITH
THE VENDER'S CREDITORS.

The tendency of practice has been to draw a clear line of distinction between that delivery which will take the effects out of the bankrupt vender's estate, and that which will make them part of the bankrupt vendee's. The point at which the property is so completely severed from the vender's estate that it cannot be taken by his creditors if he become bankrupt, is usually that at which the privilege of stoppage in transitu commences. In the case of the vendee's insolvency, Mr Brown says, "In both classes of cases the question is, *whether a sale followed by an act of constructive delivery is effectual to transfer the real right of property to the vendee.* The effect of the decision of this question is different, according as it happens to occur on the failure of the vendor or the vendee; but the decision of the question itself depends entirely upon the nature of the act of constructive delivery, and the view which the law takes of it; in other words, if a certain act of constructive delivery is effectual to transfer the property, so as to entitle the *solvent vendee* to demand actual delivery of the goods, as his property, from the creditors of the bankrupt vender, the same act would be equally effectual in a question between the *solvent vendor* and the creditors of the bankrupt vendee, to prevent the former from retaining the goods in security of the price." Brown on Sale, 515.

The course of practice has contradicted this view of the law, and leaves it questionable whether any such principle as that of "constructive delivery," as it was formerly understood, now belongs to the law of sale. Circumstances, at all events, have occurred which, in relation to any claims by the vender's creditors, would be held not merely constructive, but actual delivery, which would yet, in a question with an insolvent vendee, be insufficient to bar the vender's privilege of stoppage in transitu. This is illustrated in the case of a middleman in ordinary circumstances. The purchaser becomes insolvent; the seller uses his privilege, and stops. The goods have never entered the premises of the vendee, and are no part of his bankrupt estate. Take the other case of the goods being in the same position, but the price paid, and the vender insolvent, will it be held, that as they have not passed into the premises of the vendee, they are part of the vender's bankrupt estate? If the rule were the same in both cases, it would be so; but practice has divided the two classes of cases from each other.

With regard to the question, in which of the two we are to find the criterion of delivery abstractly, the view adopted by Mr. Brodie (Suppl. to Stair, 860, *et seq.*) appears to be the correct one, that stoppage *in transitu* may take place after delivery has

occurred; and therefore that it is not the act that brings the goods into the vendee's bankrupt estate, that constitutes delivery, but that which takes them out of the vender's. In this view, it might be a philosophical arrangement, to consider delivery as an abstract question, and stoppage in transitu as an exceptional rule operating in certain cases of delivery. Where practice has, however, marked the distinction with reference to the operation of the bankrupt law, it is convenient to consider delivery, in relation to removal from the vender's estate, as one branch of the subject, and stoppage in transitu, or the rights enjoyed by the vender before the property has passed into the vendee's estate, as another. It must be observed, however, that though the cases in stoppage in transitu do not, in general, afford illustrations of the law as to the delivery which defeats the vender's creditors, there is one class of these cases which does bear on the subject, viz. those in which the right to stop has been barred, because, when the transfer has been so effectually made, as to bring the effects into the estate of the vendee, *a fortiori*, they are removed out of that of the vender.

It has been not unusual to refer to English cases as authority in this matter; but certain fundamental differences between the law of the two countries, in the character of the rights of a vender's creditors, render such references, in general, unsatisfactory. As has been clearly shown by Mr Brown, a completed sale, in England, is a transference of the property. If there were no statutory rule modifying the law, such a sale would remove the subject, though undelivered, from the vender's estate, and out of the hands of his creditors. To defeat the obvious evils arising from such a principle, the statutory rule above referred to, which enables the assignee to take whatever property is in the disposition of the bankrupt, was created, (p. 166.) While, therefore, in Scotland, the result depends on the arbitrary rule, as to whether there has been delivery by the vender or not, in England, the question is, in the first place, whether a sale has been completed, so as to carry the property out of the vender's estate? and next, if the answer to this should be in the affirmative, whether the subject has been allowed to remain at the disposal of the vender with the vendee's consent? It is obvious, that an authority bearing on these questions, will not, in the general case, serve as an illustration of the law of Scotland.

(207.) Goods so delivered that they could not be stopped in transitu by the vender, in case of the vendee's bankruptcy, are taken out of the vender's estate, and do not belong to his creditors.

The authorities on stoppage in transitu in the ensuing section, support this proposition, and there is no case in which it is maintained, that when the privilege of stoppage is barred, there is any right which could pass to creditors.

(208.) Delivery to the vendee's servants, or into a public warehouse for his behoof, or to a shipmaster or other carrier who is to convey the subject to him, is effectual delivery.

This proposition will be found illustrated under the head of *Stoppage in Transitu*, in the ensuing section, and especially in connexion with the doctrine, that the stoppage is barred by a *bonâ fide* re-sale.

(209.) *Where the effects remain in the seller's premises.* The vender makes complete delivery of the effects in his warehouse, or other edifice, by delivering the keys to the vendee.

Maxwell v. Stevenson & Co. 4th April 1831, App. 5 W. S. 269. This was a reversal of the decision of the Court of Session, which, on the ground that by the 4 Geo. IV. c. 24, § 82, (superseded by 3 and 4 Will. IV. c. 57, § 9, see below,) special circumstances were prescribed which were to be held delivery, other methods of delivery, which would have been effectual independently of the statute, were by it rendered ineffectual. It was held in the House of Lords, that the enactment was merely directory, not superseding other methods of delivery. *More v. Dudgeon*, 3d July 1801, 1 B. C. 175, where the circumstance, that the sellers had it in their power to enter the loft or warehouse, was found not to neutralize the delivery of the key.

(210.) *Bonded warehouse.*—The occupier of a bonded warehouse may effectually deliver the goods in it to a purchaser, when the price has been "actually paid or secured," without their removal. The delivery is complete when there is a written agreement signed by the parties, or a written contract "made, executed, and delivered," by a broker or other person authorized by the parties, and a transfer has been made by the officer in his book in terms of the act.

3 and 4 Will. IV. c. 57, § 9.

(211.) The mere measuring off of a quantity of any commodity, as the portion which the vendee has purchased, or the setting aside of some specific article as to which the sale is said to apply, while the commodity remains in the premises of the vender, and under the direction of his servants, is not sufficient delivery.

Salter v. Knox & Co.'s Creditors, 7th Feb. 1786, M. 14,202, where the stipulated quantity of malt for which the vendee had

paid, was measured and set apart for him when the vender was sequestered. The principle will be found further illustrated in the authorities referred to in the inquiry immediately below.

Inquiry as to the Practicability of effecting Delivery when the Goods are to continue in the Vender's Premises.

(212.) This is a subject on which there are conflicting opinions among the highest authorities. It is said that there are certain acts called constructive delivery, the effect of which should be equivalent to actual delivery; but the law has not fixed, by decisions, the character of these acts, nor, indeed, has it decided that any act but that which, as above, puts the party in practical possession of the goods, by making him custodian of them, will, at common law, be equivalent to delivery while their place is unchanged. It is of importance, however, to inquire how far there may be any method by which the purchaser of a commodity can deposit it in the hands of the seller, for any purpose on account of which it may be convenient to do so, without involving it in the seller's bankrupt estate.

A case occurred in 1833, (*Gibson v. Forbes*, 9th July, 11 S. 916,) in which the opinion of the whole court was taken on a question, which virtually was, Whether delivery may effectually be made without removal from the premises occupied by the vender, by the goods being deposited in a part of the premises appropriated to the vendee, and their being written off from the vender's stock in his favour? As, where a wine-merchant being custodian of his customer's wine, it is bottled off and deposited in separate bins, which are appropriated to the purchaser in the binn books. The question was in this case mixed up with another; viz. Whether the subsequent transmission of the wine to the vendee was struck at by the act 1696; and this branch of the case is considered in Book III. Chap. II. The decision was in favour of the vendee. Of ten judges, however, who expressed their opinion on the question whether delivery had been made as above, five were in favour of the delivery, viz., Lords Justice-Clerk, Glenlee, Cringletie, Meadowbank, and Moncreiff; and five thought there was no delivery, viz. Lords Mackenzie, Medwin, Corehouse, Fullerton, and Craigie. The question was thus left open. Many remarks were made from the bench on acts not done, which, if they had been done, would have been in favour of the vendee. "He had," said Lord Mackenzie, "no key to the cellar. He had never, nor any one for him, seen the wine cask, or bottles. Nay, he had not, so far as appears, even received notice of the place of the cellar, or numbers of the bins, or entries in the books. In short, nothing was done that might not equally have been done, though the price had not been paid, and the company had determined not yet to deliver the wine." This case may be compared with that of *Marrable*, as above, p. 164.

Two cases referred to in the preceding section bear on this sub-

ject. *Lang v. Bruce*, 7th July 1832, 10 S. 777; and *Broughton v. Aitchison*, 15th Nov. 1809, F. C. The following were the specialties of Lang's case which bore on this subject:—Mr Rennie of Phantassie had advertised a sale by auction of cattle and sheep. There were written articles of sale, in which it was *inter alia* stipulated, that each lot sold was to be at the risk of the purchaser, "the stock to be kept fourteen days by the exposor; or if the purchaser should prefer lifting in equal proportions, commencing the first week, then the last portion will be kept one month from the date of the sale." The purchaser was to pay ready money, or grant bills with security; a precautionary condition which it was of course at the vender's option to modify. In this case he took bills, and did not demand security. There were specific marks on the cattle of each lot, except one. The purchaser Lang bought several lots, among which was the unmarked one. This lot he immediately after the sale drove to Glasgow. Another lot he, with the aid of Rennie's servants, drove next day into a field which he had hired from a third party. About the delivery of these there was no dispute. All the lots had been driven into the farm-yard to be sold, and thence, in conformity with the clause as to their custody, those which were not disposed of as above were driven by the vender's servants, at the buyer's direction, into grazing parks occupied by the vender. There were no gates on these parks. It was out of these circumstances that the question whether delivery had been made or not occurred.

It has to be noticed that these circumstances were connected with a sale by auction—a celebrated sale of stock, with the circumstances of which nearly every man in Scotland concerned in the rearing and sale of cattle was acquainted. It was almost beyond the bounds of possibility that the English reason of policy, for including goods sold and undelivered in the bankrupt estate,—that those dealing with the bankrupt are deceived into the notion of the commodity forming part of his own stock, could have occurred here. Moreover, the continuance of the stock under the control and management of the bankrupt and his servants was a matter specially agreed on at the time of the sale. The purchaser was a butcher, the seller a farmer, and it was convenient to the former that, instead of hiring other pasturage for his cattle, they should remain, till he required to remove them, on the farm where they were sold. The facility of accomplishing this object was held out as one of the inducements to purchasers. There is no doubt that it raised the price of the stock sold, the purchaser bidding not only with a view to what would be the value of the animals if they were removed at the moment, but taking into account the value of the privilege of leaving them where they were. The biddings, in short, were, not only for the animals, but for their keep in a convenient place. Yet it was maintained, by the seller's creditors, that this part of the bargain brought the subject within the bankrupt estate.

In the case of *Broughton v. Aitchison*, at the time when the venders stopped payment, the vendees had bought and paid for certain bolls of wheat, contained in a loft belonging to the venders. The purchasers maintained that they had bought the whole stock that remained in the loft, after the removal of previous purchases;—it was maintained, on the other side, that they had purchased a specific quantity, which came to a few bolls less than the actual remainder. The purchasers were bakers, and it was the usual practice of their trade to leave the wheat in the granary and remove it as it was required for use. This granary was a separate building, under the care of a person in the employment of the venders. The venders made out an order to this person to deliver the grain to the vendees, which was intimated to him. As already stated, after the stoppage, the custodier of the granary, acting under the orders of the venders, refused to give delivery. It was in these circumstances that, in a mixed view of the question of an equivalent for delivery having taken place, and of the vendee being entitled to demand it if it had not taken place, the court, by a majority, decided in favour of the vendee.

Those judges who were in favour of the vendee, in the case of *Lang*, remarking on this case, expressed themselves as doubtful of the propriety of the decision, saying, "that the doubts which we entertain concerning it, arise from the circumstances in which it differed from the present case. It was not a sale of specific marked articles, but of a specified number of bolls of grain, to be separated and measured out from a larger quantity; the allegation made to the contrary being inconsistent with the terms of the written contract. The grain had never been separated, nor at all moved from the granary from first to last. It remained under the lock and key of the venders. Under these circumstances, delivery could only be got by voluntary acts still to be performed by the venders; and they thought themselves bound to refuse to do any such act, after a very public stoppage of payment."

(213.) *Goods sold by the Manufacturer*.—When goods have a process to go through before they become the commodity which is to be paid for, and the price depends on a criterion which does not exist till that final process has taken place, they are not delivered so as to be carried out of the manufacturer's estate, by being inspected by the purchaser, and directions being given by him as to the manufacture, and samples being taken by him; no mark having been put on the goods, or on the receptacles in which they lie, to designate a change of ownership, and no entry of change having been made in the manufacturer's books.

Boak v. Megget, 13th Feb. 1844, 6 S. 662. The manufacturers were tanners, and the goods were hides partly tanned. The purchase took place on inspection in the pits. The hides

sold were distinguishable from the other stock in this respect, that so many of them were bought as Monte Video hides, and constituted all the hides of that kind on the premises, while the remainder, a specified number of native hides, were in the same pit with a portion of the foreign. The contents of these two pits constituted the subject of the transaction; and they were inventoried in a "lapping book." The agreement was, to take the hides at so much per pound, as they should weigh on the process of tanning being completed. A portion of the hides were taken out and inspected, and restored to the pit. The purchasers granted their bill to account, the balance being to be ascertained when the hides could be weighed; and the bill was acknowledged in a note of sale as, "over fifty-four crop-hides," at so much per lb. "to be delivered as soon as they are well tanned." The purchaser frequently inspected the hides,—desired the tanning to be hurried forward,—gave directions to the venders' servants, in which he spoke of the hides as his property, and on one occasion cut some pieces from them, and remarked that they were not yet ready for delivery. Before delivery, the venders became insolvent; but the question, whether delivery could take place after insolvency, was foreclosed by an agreement to treat the question as if the venders were sequestrated. It was held that there was no delivery to carry the hides out of the estate of the insolvents.

It has to be observed, that though the goods bought were distinguishable from the others in the possession of the venders, the marks of distinction were anterior to the transaction, and were not acts connected with the sale, done to effectuate the intention of delivery. It was noticed on the bench, that neither had the goods been marked, nor had the pits in which they lay been in any way specially appropriated to the vendee. It seemed to be the opinion of the bench, that the notion of symbolical delivery is a fallacy;—that where, otherwise, the property would be in the vender's creditors, any ceremony between the vender and vendee, which is not actual delivery, either by putting the article into the hands of the latter, or giving him the command over it, is insufficient to serve the purposes of delivery.

It has been mentioned that, under the clause in the English bankrupt statute, which gives the vender's creditors the advantage of property sold but undelivered, the question is not, as it is in Scotland, a pure question of delivery, but one of reputed ownership, depending on circumstances. (See p. 166.) In such a case as that of Lang, for instance, reputed ownership would be out of the question. A disposition was shown in Boak's case to approach this principle, by resting the creditors' claims, not on the arbitrary rule of non-delivery, but on the circumstance of the public being deceived as to the extent of the manufacturer's property, by his continuing in possession of the goods. The Lord Justice Clerk said, "The exceptions from the general rule are of this class; viz. cases where the possession of the party is not really looked to, in

the usage and from the nature of his trade, as necessarily proving that the stock apparently on hand is his, and not considered as creating such a presumption in the actual business of that trade. For instance,—goods in a printfield, a ship in the building dock, goods in working artificers, or even grain in a granary, if the granary is what is called a public store or warehouse,—the mere possession in these cases, from the nature of the trade, does not necessarily impart or impress the public with the conviction that the stock is all the property of the party in whose hands the articles are. In these cases, I think the principle really at the foundation of the exceptions is, that the possession does not, in the particular and notorious facts of the trade (?) and in the opinion of the public, and of creditors who are to be protected, import that the goods or stock are really the property of the party in whose hands they are seen; and, therefore, that to exclude proof of the actual fact, would give the public a benefit which, in dealing with the party, they did not truly believe they had." A manufacturer selling his own goods, and the owner of goods selling them while they are in the hands of a third party undergoing a manufacturing process, are transactions quite distinct from each other, and involve different criterions of delivery. Although the above remarks do not appear to preserve the distinction between a sale by the manufacturer himself, and a sale by an owner who has put his goods into a manufacturer's hands, it appears to be held that, in the former case, the question of reputed ownership applies; and that what would not carry the property of the commodity he sells out of the bankrupt's estate, in the case of one class of workmen, will do so in the case of another.

In the curious and special case of *Simpson v. Duncanson's creditors*, 2d Aug. 1786, M. 14204, some similar principle seems to have been kept in view. A person employed a shipbuilder. The employer was to furnish the masts and apparel, but the builder was to provide the materials for the hull. He was to be paid in three instalments,—one at laying the keel, another when the vessel was built up and planked to the top of the gunwale, and the third when the ship was launched. The builder became insolvent after payment of the first instalment. The portion of the ship completed was found to be the property of the employer. It is admitted in the report that the decision depended "not so much on general principles of law, as on the special terms of the agreement." On this case Mr Brodie says, (Edition of Stair, 900) "Holding the builder not to have been the mere mandatory of the other, it is clear that he must have been at one time the proprietor of the incipient article; but, if he were, how could the property pass from him without delivery." Some similar decisions have occurred in England, where they are more conformable to the principles of the contract of sale. See *Woods v. Russell*, 5 B. & Ald. 942.

(214.) *Timber* is not held as delivered until it is severed

from the ground, and there is no known form by which growing timber can be effectually sold so as to defeat the creditors doing diligence against the land, except as part of the land itself.

Paul v. Cuthbertson, 3d July 1840, 2 D. 86. The bargain was for "the cut" of certain boundaries of wood, and the time fixed for cutting was the ensuing spring. The price was paid in bills. While very little was cut, the proprietor of the estate was sequestered, and it was found that the purchaser's right was bad. Before the sequestration, the purchaser had cut several trees, and carried them off in a cart, and drew up a minute announcing that he had thereby entered into possession. This was an attempt to take symbolical possession, as to which it was remarked from the bench, "We are in much difficulty to see how such a proceeding as that founded on can by possibility either vest a real right in a part of the estate remaining heritable, or convert what is heritable into moveable subjects. The transference of heritable rights by the ceremony of seisin is a known part of the law,—that ceremony being the appointed form which creates and ascertains the right. But, because that is in itself only a form, does it follow that any one may invent for himself a proceeding by which, without any conveyance of the land at all, and without any seisin, he may establish a real right in heritable subjects attached to it?" Lord Cuninghame, who, with Lord Jeffrey, differed in opinion from the other judges, thought the sale ought to be considered as a lease, protected by the act 1449 against a singular successor, but it was held to be a disposal of a *pars soli*, and the analogy of holders under strict entails, and of liferenters, in their power to dispose of wood, was applied. There was a circumstance founded on to some extent in the consideration of this case, that a proportion of the trees, to be reserved in the cutting, were to be marked off by parties mutually chosen, and that this operation not having been completed, a circumstance was wanting to render the bargain specific. It was held, however, that the above general principles were sufficient for the decision of the case, and that there was no occasion to found on this specialty.

It does not appear by this case, what would be held absolutely to constitute delivery, but it may be observed that the principle stated above, and the others on which the bench proceeded, would not apply to wood cut down for removal, though unremoved. If the wood were sold when in that state, undoubtedly delivery could not be held as taking place without some farther act being done,—the trees would be in the same position as goods in a warehouse. But if the trees were sold when standing, and were cut down by the buyer, it would seem that this would be an effectual taking possession. At all events they would cease to be attachable in the form of heritage, and passing from heritable to moveable, it is difficult to suppose that when the act of the buyer is countenanced as efficacious to create this transmutation, it is

to go for nothing as an exercise of property on his part. It would seem, indeed, from a case reported, 2 B. C. 28, from Baron Hume's papers, (*Muirhead v. Drummond*, 16th May 1792,) that wood cut and barked is to all intents and purposes delivered; and Lord Medwyn remarked in reference to the purchaser's title to the wood in the above case, "there will be no *jus in re*,—no real right will be acquired by him till it is separated from the solum, and the condition of it is changed from heritable to moveable." In such a case as that of Paul, though from the time when a sequestration stops all interference with the property of the bankrupt and those deriving right from him, no one may cut down the trees on his land in virtue of a sale, yet there might be some difficulty in applying the doctrine to those departments of the bankrupt law which do not judicially tie up the estate, were the purchaser to act for himself. Suppose the case to occur under the act 1696. The proprietor sells the wood and receives the price, and within sixty days of the seller's bankruptcy, the buyer has cut it down, and carried it off. If it be granted that the transaction is reducible if the seller had volunteered delivery, it would be still doubtful if the act could reach the case where the buyer alone is a party to the removal, because, as elsewhere shown, (B. III. Ch. II. § 1) it is the intention of the creditor to give a preference, and not that of the debtor to take one, that brings a transaction under the act. Again, in the case of mere insolvency, the arguments in which, in the cases of *Broughton and Lang*, (see above, p. 174,) it was pleaded, that notwithstanding the seller's insolvency, the purchaser was entitled to delivery, would apply with still greater strength to a case where the seller unlocks no granary and opens no park gate, but where the buyer carries off his purchase from an unfenced plantation, probably without the seller being aware of his doing so.

Farm Produce.

(215.) The practicability of making an effectual delivery of growing corn would probably be considered as involving the same principles with those connected with the delivery of wood, notwithstanding the difference of the two subjects as heritable and moveable. There has been no late case on the subject, and questions are not likely to occur in connexion with it, as the landlord's hypothec generally sweeps away any ground of question between purchasers and ordinary creditors. There is, however, an old case in which growing corns were found effectually delivered—*Grant v. Smith*, 21st July 1758, M. 9561. The grain was purchased by creditors, and sold by them to the incoming tenant, so that there was no alteration. The report says, "these sales were publicly and openly made, and the corn delivered to the buyers by a sort of symbolical delivery on the spot." It may be questioned if this case be an authority. See *Roberts v. Wallace*, 29th July 1842, 5 D. 6.

(216.) When effects are in the custody of a third party, as a warehouseman, a manufacturer performing some operation on them, &c., an intimation of the sale and of the person for whom he is to hold the subject, or an acknowledgment by the custodier that he holds for the vender, is effectual delivery.

Tod v. Rattray, 1st Feb. 1809, F. C., where, after two intimated sales, the second being onerous, the original vender was not entitled to stop in transitu on the ground of the intermediate vender's bankruptcy. *Main v. Maxwell*, &c. 27th July, 1710, M. 9124; *Auchie, Ure, & Co. v. Spence*, M. 14226, reversed on appeal, 16th March 1810, 1 B. C. 195. This subject will be farther illustrated in connexion with stoppage in transitu. As to the effect of a delivery order on the seller's servant having the custody of the commodity in his own premises, see the case of *Broughton*, above, p. 167. The converse of the above, viz. that goods which are in the hands of a manufacturer, to have a manufacturing process performed on them, are not delivered by a sale without intimation to the manufacturer, was shown in *Eadie v. Mackinlay*, 7th Feb. 1815, F. C. There were many specialties, all bearing on the question whether notice had been given. The court were of opinion that "there was no legal notification." See *Auld v. Hall & Co.* 12th June 1811, F. C.

It will of course be an essential element in delivery, in terms of the above proposition, that the sale have been completed, and that there be no process still to go through to separate and individualize the subject of the sale. See Mr Brodie's Supplement to Stair, p. 875, *et seq.*

SECT. 3.

STOPPAGE IN TRANSITU.

Introductory Notice.

It will be found conducive to a clear explanation of the operation of stoppage in transitu, to keep in view the particular object for which the practice was sanctioned. It has been the feeling of all lawyers, and all enforcers of the law, in commercial countries, that, when bankruptcy occurs, it is a good policy to narrow as far as possible the circle of transactions to be involved in its operation, by giving every facility to those who have last contracted with the bankrupt to recover their position. The operation of this policy meets with an antagonist in the inexpediency of allowing any set of creditors to have a preference over others, and the difficulty of drawing a practical line in favour of the creditor, when those circumstances which convert the one party into a creditor, and the other into a debtor, have actually taken place. In a commercial country, the revindication of

goods, actually in the warehouse of a merchant, looked upon by those who deal with him as his own stock, in a condition to be purchased by his customers, would create inextricable confusion, and would afford no means for drawing a distinct line which should admit one set of creditors to revindicate, while it excludes another. It was a principle derived from the civil law, and long followed in practice on the continent, that so long as the unpaid vender could specifically distinguish the subject he had sold, unmixed with the bankrupt's other stock, and unchanged in form, he was entitled to recover possession of it. The principle was received in Scotland on an arrangement more susceptible of practical application: the seller of goods unpaid for, delivered within three days of the bankruptcy, was entitled to recover them on the fiction that the taking delivery under such circumstances was fraudulent. The court adopted this principle in deciding the case of Stein, in 1788, where, of a large quantity of grain which had been long in the course of delivery, they found that what had been delivered within the three days preceding the bankruptcy must be restored. On this case being carried to the House of Lords, the decision was reversed, "without prejudice to the respondents in the said appeal producing evidence to show that they were entitled to stop and retain the grain consigned by them to James Stein, the bankrupt." *Allan Steuart & Co. v. Creditors of Stein*, 4th Dec. 1788, and 23d Dec. 1790, M. 4949. By this decision the law of fictitious fraud in Scotland was abolished, and the foundation was laid for a series of decisions sanctioning stoppage in transitu as practised in England.

Wide principles with relation to the law of sale had been adopted at a time before the practice of stopping in transitu had been resorted to, or thought necessary; and an endeavour to reconcile this latter practice, the creature of a complicated and highly artificial state of commerce, with principles laid down in its early and simple stages, has produced considerable confusion and difficulty. In England, as above observed, it is a principle of the contract of sale, that the property is transferred when the bargain is completed, in terms of the statute of frauds, though there has been neither payment nor delivery. In Scotland, the principle, derived from the civil law, is, that the property passes to the vendee only on delivery. It is plain that this latter doctrine left more room for the adoption of measures for the protection of the vender than could readily be found in the law of England. The necessity, however, of a system which should be both the most conducive to the interests of commerce, and be uniform in its operation in both ends of the island, was paramount to a rigid adherence to general principles. The remedy of the creditor in Scotland was, as we have seen, narrowed in its operations, while, on the other hand, according to the admission of Lord Thurlow, the extension of this remedy in England was introduced "from the customs of foreign nations," (see 1 B. C.

209 n.) There were other first principles in the law of vender and purchaser, in both ends of the island, which were bound to give way to the expediency of sanctioning stoppage in transitu. In England, though the seller retained what was called a lien on the goods sold till the purchaser should be prepared to fulfil his part of the bargain, he lost that lien when he put the subject into the hands of a middleman, whose duty it was to convey it to the purchaser, or to hold it at his order, *e. g.* a carrier or warehouseman. In Scotland, too, delivery, whether called real or symbolical, could be effected by such means, and the property be accordingly transferred. "In my opinion, delivery to the carrier is presumed delivery to the party, unless the contrary is proved."—Chief Comm. Adam, in *Dicksons v. Ponton*, 13th July 1824, 3 Mur. 440, see above, p. 170. Yet these were the cases in which the right of stopping in transitu presented itself as an expedient remedy, and the action of these principles had to give way to its adoption. In relation to other questions, such a middleman holds the goods in his hands at the order of the vendee. He is responsible to the vendee for their custody, and the vender ceases to have an insurable or any other proprietary interest in them. Yet, for the purpose of preventing them from being mixed up with the bankrupt estate, he may interfere by the exercise of his privilege of stopping in transitu. From all these considerations, it will be easily gathered that an attempt to identify this right with any of the principles or operations of law acknowledged before it came into existence, will only lead to confusion. It is as completely *sui generis* as if it had been specially created by statute. It is not properly a lien, for a lien presumes the retention of possession; and it will be hereafter seen that the privilege begins where a right of lien would end. It is not an exercise of the right of property, for, in England, the seller's property ceases when the bargain is completed, and in Scotland, it ceases when the right to stop in transitu begins. It is not a hypothec, for it is the nature of that right to follow its subject into whatsoever hands it may fall.

It deserves, however, to be here noticed, that a privilege bearing some analogy to that of stopping in transitu, and having the same equitable purpose, seems at a comparatively early period to have attached itself to the commerce in heritable property. Thus, in *Baird v. Jap*, Aug. 1758, M. 14156, where an insolvent disponee had got possession of the premises, the disponent kept possession of the disposition, and was preferred to the disponee's creditors. See also *Selkirk v. Selkirk*, Dec. 1721, M. 9167; *Remarks M. St. lxxxix.*; and *Black v. Dick*, 17th May 1814, H. 699.

The safest definition of the right to stop in transitu, and that which will be found most in accordance with the detailed illustrations of the operation of the right, seems to be the following:—

(217.) *Definition.*—Stoppage in transitu is a privilege

held for his own protection by the vender of goods who has parted with their custody, enabling him to intercept them before they have gone into the possession of the vendee, on the vendee becoming insolvent and unable to pay the stipulated price.

It has been long disputed, and is not yet settled, whether the exercise of the privilege has the effect of annulling the contract. From the general tone of decisions and opinions, however, it may be collected, that it has not; that it is merely a suspension of performance on the part of one party until the other is ready to perform his part; and that notwithstanding the exercise of the right, the purchaser may demand delivery, if he proffer payment, provided the proffer be made within such reasonable time as shows a disposition to complete the old bargain, and not a new proposal arising out of a favourable change of circumstances. "The buyer," says Mr Justice Bayley, in *Bloxam v. Sanders*, 4 B. & C. 949, "or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if any thing unwarrantable is done to that right. If, for instance, the original vender sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury." In Mr Shee's edition of *Abbott on Shipping*, (1844), it is remarked, p. 516, "It would appear that the exercise of this right does not proceed upon the ground of rescinding the contract, but assumes its existence and continuance; and, as a consequence of that principle, it has been held that, after stopping the goods in transitu, the vender may sue for and recover the price of them, provided he be ready to deliver them on payment. Yet, in more recent cases, the question whether the effect of stoppage in transitu be to rescind the contract, or merely to revert the lien in the vender, was considered still unsettled." In the comparatively old case of *Hodgson v. Loy*, 1797, 7 T. R. 440, where it was found that part payment did not take away the consigner's right to stop, Lord Chief-Justice Kenyon remarked, "that the right of the vender to stop goods in transitu in case of the insolvency of the vendee, was a kind of equitable lien adopted by the law for the purposes of substantial justice; and that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding the contract." In the later case of *Clay v. Harrison*, 1829, 10 B. & C. 99, where it was found that, after an exercise of the right to stop by notice not to deliver, the vendee had no interest to recover on a policy, Mr Abbott, then Chief-Justice Tenterden, said, "It was argued, on the part of the defendant, that its effect was to rescind the contract, and to revert the property in the original owners: on the part of the plaintiffs, that it only restored to the owners a right of possession, and

placed them in the same situation as if they had not parted with the goods. *There does not appear to be any case in which this point has been expressly decided.*" See *Stephens v. Wilkinson*, 2 B. & Adol. 320; *Edwards v. Brewer*, 2 M. & W. 375; *James v. Griffin*, 1837, 2 M. & W. 623.

(218.) *Circumstances justifying.*—The proper ground of stoppage is the vendee's insolvency. It is settled in England that the person ordering the goods to be stopped takes the risk of the vendee being insolvent, and unable to pay the price or fulfil the condition of the sale; and that, if it should prove otherwise, he will be responsible for his breach of contract.

The *Constantia*, 27th June 1807, 6 Rob. Adm. 321. In this case Lord Stowell said, "If the person to whom they are consigned is *not* insolvent: if, from misinformation, or from excess of caution, the vender has exercised his privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to a delivery of the goods, with an indemnification for the expenses that may have been incurred. In the law of England, so far as I can recollect it, and in all books into which I have looked, it is not an *unlimited* power that is vested in the consigner, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller for the particular purpose of protecting him against the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution." In *Walley v. Montgomery*, 21st May 1803, 3 East, 585, the consigner, having advised the consignee that he had drawn bills, was found not entitled, on refusal of immediate payment, to stop the goods, the consignee not objecting to accept the bills, and not being insolvent.

(219.) A partial payment of the purchase money, or the granting of a bill for it, on which a partial payment will be obtained by ranking on the vendee's bankrupt estate, have been found in England not to bar the right to stop when the vendee is insolvent.

Hodgson v. Loy, 7 T. R. 440, *Abbott*, 514; *Fiese v. Wray*, 3 East, 93; *Edwards*, as above. As to how far this may be held law in Scotland, see 1 B. C. 222.

(220.) *State of Transitus.*—While goods remain in the custody of a carrier, wharfinger, or other middleman who

is not the servant of the vendee, but is employed specially in the intermediate custody of the goods, the seller may stop.

Robertson & Aitken v. More, 3d July 1801, *M. Sale*, App. No. 3; *Black v. Cassels*, 30th May 1828, 6 S. 894. See this case, as considered in relation to acts of ownership, and the other cases cited below. It was pleaded in one case, *Dunlop v. Scott*, 22d Feb. 1814, F. C., that the transitus in the case of a carrier meant the mere passing of the goods from place to place; and that immediately on their arrival at the place where the consignee was to receive them, the transitus was at an end. It was found, however, in that case, that while the goods remained in the carrier's premises, they might be stopped. The goods were receipted, "to lie till called for." See in England, *Tucker v. Humphrey*, 12th Feb. 1828, 4 Bing. 516.

In *Anderson v. Duff*, 16th July 1844, D. R. F., certain trees were sold at the agreement of so much per foot, ready money, on measurement on the plantation before removal. Part of the wood was in saw-pits on the premises, cut into railway sleepers. Part was on a quay in the neighbourhood, where it was a portion left over of a quantity that had been shipped. It was found that both the wood on the premises, and that which lay on the quay, was liable to be stopped, and so not attachable by a creditor of the vender.

(221.) When goods are in a ship freighted by the vender for the voyage, they are still in transitu, and liable to be stopped.

Drake v. McMillan, 8th July 1807, H. 691. The vendee in *Kirkcudbright* had hired the ship from the owner in Whitehaven, for a voyage to Memel, and thence to Belfast with a cargo of timber. "It was agreed on the bench, and was said to be now the law of England, that goods are still in transitu, after having been put on board in a foreign port, though the ship is not a chance ship or a general carrier, but a ship freighted by the vendee for that voyage, and sent by him to receive the goods. That it may possibly be otherwise in the case of a ship hired by the vendee for a term of years; but that one which is freighted for the voyage only, whether by vendee or vender, is still to be considered as a carrier, and the goods are not in the hands of the vendee, but on their way to him only." It was so decided in *Baxter v. Pearson*, 8th July, 1807, H. 688. The same has been held in England. *Bothlingk v. Inglis*, 11th Feb. 1803, 3 East, 381. It is there also held, that where the consignee hires a ship for a term of years, and mans it, and buys goods which he sends on a mercantile adventure, they cannot be stopped after they are shipped. *Abbott*, 522.

(222.) The delivery of a portion of a cargo does not

bar the right of stopping as to that part which remains undelivered.

Collins v. Marquis's Creditors, 23d Nov. 1804, M. 14223.

(223.) If delivery be not claimed, and the goods, on the notorious insolvency of the vendee, are removed from the custody of the carrier, and taken charge of by a third party, they are not so delivered to the vendee as to be open to the diligence of his creditors, in preference to the claim of the vender stopping.

Neish v. Trompowsky & Co., 8th July, 1807, H. 693. No one claiming delivery, the ship's husband, of his own authority, paid the duties, and had the effects landed in a public warehouse for the shipper's behoof. The ship was a general ship. The competition was between the shipper and an arresting creditor. It was observed on the bench, "The ship's husband took the right course when he lodged the cargo in a warehouse, which saved the rights of all concerned, and those especially of the shippers. Then their right of stoppage was equally entire, as if the hemp had been still on board." See *Mitchell & Gowans v. Phin*, 12th Jan. 1813, F. C.

(224.) *Effect of Exercising the Right.*—If notice to stop delivery have been communicated in the proper manner to the proper person, subsequent delivery through mistake or design will not make the goods part of the insolvent's estate.

Sinclair & Williamson's Creditors, v. Robertson & Aiken, 3d July 1801, 1 B. C. 229. So in England, *Litt v. Cowley*, 11th Nov. 1816, 7 Taunt. 169. The delivery was made in this case by the mistake of a clerk, and the goods were revindicated after they had passed to the assignees on the vendee's bankruptcy. See *Northey v. Field*, 2 Esp. 613, where, under the old bonding system, goods being sold on the duty, &c. not being paid, the venders having intimated a claim, the price was found to be theirs.

No attempt has been made in the decisions or law books to define any form in which it is necessary to effect the stoppage. It seems sufficient that the circumstance of a direction having been given by the person entitled to stop, is proved. It will generally be expedient to give the notice or direction in writing, not as being in that form more effectual, but being more likely to be satisfactorily proved.

(225.) *How the Right is terminated.*—The warehous-

ing of the goods by the vendee, for his own behoof, terminates the right to stop.

Strachan v. Knox & Co.'s Trustee, 21st Jan. 1817, F. C. The goods were bonded in the name of an agent of the vendee.

(226.) It has been decided in England, and is generally assented to in Scotland, that when goods are in the possession of a third party, who holds them for the vender, as a warehouseman,—a manufacturer, in whose hands they are undergoing a process, &c.—an intimation of sale to the custodier, with instructions, which he does not object to obey, to hold the articles for the vendee's behoof, or an entry in the vendee's favour in the custodier's books, will terminate the right to stop.

Harman v. Anderson, 1809, 2 Camp. 243. It was here observed, that the payment of warehouse rent by the vendee, is "a circumstance to show on whose account the goods are held;" but it did not seem to be received as itself constituting a change of property. Opinions in *Hawes v. Watson*, 1824, 2 B. & C. 540. See, in Scotland, *Auchie, Ure, & Co. v. Spence*, 23d Nov. 1804, M. 14226, reversed 1810, 1 B. C. 195; *Tod & Co. v. Rattray*, 1st Feb. 1809, F. C.; *Laurie v. Black*, 12th Nov. 1831, 10 S. 1. It may be questioned if, under the Excise bonding system, relative to spirits, delivery can be made by notice to the store-keeper; or if possession can be changed without removal of the effects, under 4 Geo. IV. c. 94. See *Wyld v. Richardson*, 17th May 1832, 10 S. 538.

In connexion with this subject, see Mr Brodie's view, that stoppage in transitu is not properly applicable to effects so transferred, as never being in transitu,—being undelivered as respects the vender before the transference is completed, and virtually in the vendee's own custody when it is completed. Supplement to *Stair*, 872, *et seq.* Mr. Brodie objects to the general admission in the Scottish authorities, that intimation to the custodier, without his acceptance of it, and consent to hold the goods for the vendee, is sufficient to effectuate a transference.

It has to be observed, that before the transference can be completed, the sale itself must be completed by the specification and identification of the subject. On this the following is laid down, by authority, as the law of England:—

"If nothing is to precede it, and the order has been handed by the buyer to the warehouseman, and if he has made the usual entry in his books, changing the name of the proprietor,—or even if he has not made such entry,—the handing the order to the warehouseman is a constructive taking possession by the buyer, and the order cannot be countermanded. *A fortiori*, it cannot be countermanded if the buyer has actually removed from

the warehouse a part of an entire quantity of goods sold at one fixed and entire price; but if any thing is to be previously done, on the part of the seller, to ascertain the amount of the price, or to ascertain and perfect the specific subject of the sale,—such, for instance, as weighing the goods,—an order for delivery may be countermanded before such previous act is done.” Abbott on Shipping, 526-527. See Brodie’s Supplement to Stair, 876.

There is a late English case which seems to decide, that where a weighing is to take place, but that weighing is only for the satisfaction of a party, and is not essential to the individualizing of the subject, which is otherwise separated and set apart, the property is transferred by an order to a warehouseman, and transfer in his books. *Swanwick v. Sothorn*, 6th Feb. 1839, 1 Per. & Dav. 648. The order was, to deliver to the vendee 1028 bushels of oats, binn 40; and “you will please weigh them over, and charge us the expense.” There were no more oats in binn 40. It was found that the weighing was not necessary to vest the property, and that the right to stop was terminated by the transfer.

(227.) When the purchaser is in such a position, that had he paid the price, the goods would have been part of his own estate, if he sell them for value to a third party, by an onerous and *bonâ fide* sale, the right to stop is terminated.

Tod v. Rattrays, 1st Feb. 1809, F. C. This was a case of transference in a bonded cellar. Some of the judges questioned if the right to stop was barred as against the first purchaser, who had failed; but it was not questioned, that the second purchaser, having paid for the goods, and got an order of delivery, the right to stop was as effectually barred as if the first purchaser had paid. In the case of *Auld v. Hall & Co.* 12th June 1811, F. C. there was a *bonâ fide* sale, but the delivery orders had not been intimated.

(228.) The indorsement, by the consignee, of a negotiable bill of lading, for value, in the usual course of trade, bars the right to stop the effects which the bill of lading represents.

Buchanan v. Swan, 13th June 1764, M. 14208.—The earliest Scottish case in which the indorsable character of the bill of lading, to the effect of carrying the property represented by it, seems to have been admitted. *Arthur v. Hastie, &c.* 12th Dec. 1770, M. 14209. *Bogle v. Dunmore*, 2d Feb. 1787, M. 14216, which was not properly a case of stoppage in transitu, but where the principle was affirmed. The principle of the absolute negotiability of bills of lading has been long established in England. See Abbott, 327. And, though the Scottish cases do not

bring out the rule with the same precision, the establishment of the doctrine is held as undoubted, 1 B. C. 213, *et seq.* The leading decision on the subject in England is that of *Lickbarrow v. Mason*, 1793 and 1794, 5 T. R. 367, 683. The rule is an illustration of the principle, that delivery, properly speaking, is completed when the effects pass out of the custody of the vender into that of the vendee, and that stoppage in transitu is not the vender's exercise of the right of property, but an equitable privilege extending over that which has passed out of his estate, so long as it has not come into the vendee's custody. The privilege may be exercised against the insolvent vendee, while it is precluded as against his onerous indorsee. See on this subject Brodie's Supplement to Stair, p. 862, *et seq.* It is a legitimate inference of the principle on which the right to stop is thus barred, and has been so followed in practice in England, that when the indorsee of the bill of lading is aware of circumstances on the part of the indorser which would justify a stoppage at the time of the indorsement, he is not exempt. Thus, if the indorsee knew the consignee to be insolvent, the right to stop is not barred, *Cuming v. Brown*, 9 East, 506. On the same principle, if there is a condition as to payment on the face of the bill of lading, an indorsee takes it, subject to the vender's power to stop, if that condition is not complied with, *Barrow v. Coles*, 3 Camp. 92.

(229.) By statute, the right to stop is barred, in so far as it might affect a disposal of the effects represented by any one of the following documents when made by "any person intrusted with or in possession of it," viz. "any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for the delivery of goods," provided the vendee has not notice on the face of the document or otherwise, that the person intrusted with it is not the true owner of the goods represented by it.

6 G. IV. c. 94, § 2. The act of which this is a clause is commonly known as the Factor's Act. It is generally understood that its remedial operation in validating the contracts of persons who were the apparent, but not the real owners of the effects at their disposal, was not so necessary in Scotland as in England. See the opinions in *Boak v. Megget*, 13th Feb. 1844, 6 D. 662, and *Abbott*, 541.

(230.) It has been decided in England that the vendee may effectually take possession of the goods before the transitus, as originally intended, is terminated: and that, by doing so, or performing an act of ownership on the goods in their passage, and while they are in the middleman's possession, he precludes the right to stop.

It seems in the older cases to have been a question whether the vender could take possession before the intended transitus was completed; in the later cases the question has been generally whether the act done was or was not sufficient to indicate ownership. In *Holst v. Pownal*, 1794, 1 Esp. 240, the vessel had reached her port, and was performing quarantine. The assignees of the vendee's bankrupt estate, (who, according to the principles of English law, and as was admitted in the case, were the same in law as the vendee himself,) sent persons on board who claimed the cargo, and remained with it opening some chests. This was held not to bar stoppage. On the other hand, in *Mills & others v. Ball*, 12th June 1801, 2 Bos. & Pul. 457, it was laid down by Lord Alvanley, C. J., that, "if, in the course of the conveyance of the goods from the vender to the vendee, the latter be allowed to exercise any right of ownership over them, he thereby reduces the goods into possession, and puts an end to the vender's right to stop them." In *Foster v. Frampton*, 1826, 6 B. & C. 107, the right to stop was barred by the vendee taking samples of the goods while they were in the carrier's warehouse. See on this subject *Cross on Stoppage in Transitu*, p. 378, *et seq.*

In Scotland this point seems not to have been the subject of direct decision, but in the case of *Black v. Cassels*, 30th May 1828, 6 S. 894, proceedings which would probably in England have been held an act of ownership, did not bar stoppage. A carrier was employed to convey whisky, "He brought the puncheon direct to the defender; but the shop being small, the defender had not room at the time to take it in. He, therefore, requested Campbell [the carrier] to allow it to stand in his store-room until the defender should find it convenient to take it to his own house. This Mr Campbell readily agreed to as he had done on former occasions; and in consequence the puncheon has remained in the store for the defender ever since." Stoppage in the carrier's hands was found to be still competent. This decision may be compared with the English case of *Rowe v. Pickford*, 25th Nov. 1817, 1 Moore, 526, where the vendee having no warehouse, and on the arrival of the goods having gone and inspected them in the carrier's warehouse, and agreed that they should remain there, the transitus was found at an end. In *Schuurmans v. Goldie*, 9th July 1828, 6 S. 1110, Lord Glenlee seemed to think that the payment, by the consignee, of freight on a cargo consigned, was what would be counted in England an act of ownership sufficient to terminate the transitus; but it was found that freight had not been paid, and entry at the custom house, and payment of duties on the part of the consignee, were thought not to be equivalent. (See this case, p. 198.)

(231.) It has been found in England, that the right to stop is limited to a vender, or a person acting for him in the capacity of agent or otherwise; and that a surety for

the price, or any person who may have a like contingent claim against the vendee, has no title to stop.

Siffken v. Wray, 17th May, 1805, 6 East, 371. In *Fiese v. Wray*, 17th Nov. 1802, 3 East, 93, it was found, that a commission agent abroad, who obtains goods on his own credit, and ships them without naming his employer, may stop them. In *Morison v. Gray*, 3d July, 1824, 2 Bingh. 260, an indorsee of a bill of lading was found entitled to stop. The goods had been shipped at Dundee to the order of a London merchant, and on his failure the bill of lading was sent to a person who was authorized to stop the goods. The circumstances occurred before the passing of the first Factor's Act, (4 G. IV. c. 83,) and it was questioned whether the indorsee of the bill acted as owner or as agent. Under the act he would be entitled to order the disposal of the goods as owner.

(232.) *Lien*.—The holder of a lien over goods has been found in England to have no title to stop them in transitu.

Sweet v. Pym, 1 East, 4. This was the case of a fuller, and the goods were in the possession of a shipowner as carrier. See *Abbott on Shipping*, 520.

(233.) *Factor*.—It has been held in England that a factor has not a right to stop goods in transitu to his employer, for the balance for which he would have a lien were the goods in his own possession.

Eyre, Chief-Baron, in *Kinloch v. Craig*, 19th May 1790, in the House of Lords, 3 T. R. 783. The factor's recourse is limited to a lien, which, on the principle above stated, par. 232, does not include the right to stop. As the Factor's Act does not in any respect alter the relative rights of principal and factor against each other, unless where third parties treat with the factor as principal, it will not affect this principle.

SECT. 4.

THE VENDEE INSOLVENT BEFORE DELIVERY, BUT THE RIGHT OF STOPPAGE NOT EXERCISED.

(234.) A person who is insolvent may reject goods which are sent to him in terms of a bargain, and if the rejection be distinct, he is not entitled, by any subsequent act, to appropriate them for the benefit of his creditors.

Inglis v. Port-Eglinton Spinning Co., 27th Jan. 1842, 4 D. 478. The insolvent had refused to receive the goods, and they were laid down at his door. They were sent, by the insolvent's

direction, to the premises of a partnership who had connexion with the consigners of the goods, and who were themselves creditors; and the insolvent, observing that the proceeding was objected to by some of the creditors, a portion of the goods were sent back and received in the insolvent's premises. The consigners were afterwards allowed to remove these goods, the person in charge supposing that they were taken for the benefit of the creditors. The insolvent's avowal of insolvency, by calling a meeting of his creditors, did not occur until several days after this transaction. The decision rested on the fact of the first complete rejection, which could not be recalled by subsequent proceedings.

In the case of *Drake v. M'Millan*, 8th July 1807, H. 691, circumstances seem to have taken place which were equivalent to rejection by the vendee, and which precluded the goods from coming into the bankrupt estate, if they could otherwise have done so. The vendee, who lived in Scotland, on the arrival of the goods from the continent, at Belfast, in consideration of his insolvency, employed a writer in Edinburgh to take the direction, and act for all concerned, and transmitted to him the invoice and bill of lading. The writer employed a person in Belfast to attend to the business, "so that the cargo may be landed with all convenient speed, and retained for the benefit of the creditors at large, or the shipper, whoever may be found to have the best right thereto." This writer, being afterwards chosen interim factor and trustee on the vendee's sequestrated estate, was directed by the creditors to take possession of the goods for their own behoof, but was found not entitled to do so.

It is a natural inference from this principle, that the insolvent may reject proffered delivery, and after such rejection receive the effects into his warehouse for interim custody, without making them part of his bankrupt estate. This is exemplified in *Steins v. Hutcheson*, 16th Nov. 1810, F. C. See also *Mitchell and Gowans v. Phin*, 12th Jan. 1813, F. C., where the vendee's son and a clerk disposed of the goods for interim custody. It was observed on the bench, that if they had taken them into the warehouse, it would not have affected the vender's right to stop.

The utmost extent to which the English decisions appear to have gone in the same direction with ours, in this matter, is to hold, that if the bankrupt decline taking the goods out of their transitus, and, consequently, perform no act of ownership on them, they continue liable to stoppage. See *James v. Griffin*, 1837, 2 Mees. & Wel. 623. Here the vendee expressed reluctance to take the goods, telling the shipmaster, that they ought to be kept for the vender, and directing them to be left on the wharf. The question to the jury was not whether he had repudiated the goods, but whether they were, while remaining on the wharf, still in a state of transitus, so as to be liable to be stopped by the vender; and it was found that they were. It seemed to be thought that an attempt to repudiate them might be considered an act of ownership, taking the goods out of their transitus.

(235.) *How far Insolvency equivalent to Stoppage.*—Although it has not been settled by decisions, that the avowed insolvency of the vendee is equivalent to stoppage in transitu, so as to annul delivery thereafter, it has been decided, that if he intimate insolvency to other creditors, but fail to intimate to the vender, who, not being warned, does not attempt to intercept delivery, the receiving the commodities, in such circumstances, is in *mala fides*, and the delivery is not legal.

Schuermans v. Goldie, 9th July 1828, 6 S. 1110. This was a case of a consignment from abroad. On the arrival of the cargo the customs duties were paid by the consignee; but the freight was unpaid. The delivery proceeded on the 5th and 6th of January. On the 4th January, and previously to any part of the delivery, the consignee sent notice of having stopped payment to his English creditors, and to one creditor in Scotland. On the 5th, when delivery commenced, intimation was sent to the Scottish creditors in general. The foreign consigner had an agent in Scotland, and in the neighbourhood, to whom notice was not posted until the 6th. Unfortunately, in this case, the general principle, whether, after a publication of insolvency, the receipt of delivery is valid, was carefully avoided, and the decision rested on the special circumstance, that the insolvent, if he had dealt by the foreign consigner as he did by his other creditors, would have put it in his power to stop.

The leaning of this and of the other cases is towards the view that a public act of insolvency,—such as the stopping of payment or intimation to creditors,—is equivalent to stoppage in transitu, as being a fact which, were the vender aware of it, as other creditors are, would prompt him to direct an immediate stoppage. See *Robertson v. More*, 3d July 1801, M. Sale, App. No. 3; *Stein v. Hutchison*, 16th Nov. 1810, M. Syn. 73; and *Drake v. M'Millan*, 8th July 1807, H. 691. In this last case, "The judges were of opinion, that, resolved as M'Caul was immediately to give up business, and apply for a sequestration, he not only might warrantably refuse to take the cargo, but could not honestly have received it; and that such wrongful delivery, if taken, would not have been available to his creditors or their trustee, who could be in no better case than M'Caul himself."

But perhaps the cases which make the nearest approach to the principle, that public insolvency is equivalent to stoppage in transitu, are two others, reported by Baron Hume. The case of *Carnegie & Co. v. Hutchison*, 25th Feb. 1815, H. 704, was one in which restitution was ordered to the vender after actual delivery to a bankrupt purchaser; and, if it were not a decision on specialties, it would be held to settle the question, that published insolvency is equivalent to stoppage. The vender's credit was gone at the time when he professed to purchase the goods, and he was re-

presented as struggling to preserve himself from bankruptcy. It was farther shown, that he intended not to sell the commodities in the way of trade, but to raise money on them immediately. The court seemed to found their judgment on the fraudulent character which tainted the whole transaction.

Brown v. Watson, 21st Dec. 1816, H. 709, was a case, in some degree, of the same character, mixed up with specialties as to what constitutes delivery of sheep and cattle. The vendee was making efforts to support his credit; and it was supposed that his paying for the effects purchased depended on his obtaining certain advances, which he failed in obtaining. He was from home on the day when the cattle were driven to his farm, and his servants took charge of them; but they had received no special instructions on the subject. There was a distinction in the case of the sheep, which, it appears, were not even received by the vendee's servants, but were disposed of by the vender's servants on the vendee's grounds. A few days after the arrival of the cattle, and on the day after that of the sheep, instructions were given by the bankrupt to redeliver them, and the court sanctioned this redelivery. Baron Hume appears to consider the decision questionable in the case of the cattle, but not in that of the sheep: the circumstances from which the vendee's hopeless condition emerged, occurred between the two, and it was said, "To take delivery in such circumstances, without a prospect even of being able to pay, would have been, according to our notions, a dishonest act, and unavailable either to him, [the bankrupt,] or his creditors." The vendee's absence on the occasions when the animals arrived at his premises, was considered of importance, as it lay with him, in the circumstances in which he stood, to refuse acceptance of delivery.

In England it is held, not only that an act of bankruptcy is not equivalent to stoppage in transitu, but that, after the fiat and adjudication, when the bankrupt has ceased to be a trading person, or even to be the agent of his creditors, the assignees may receive into the bankrupt estate all effects delivered. See *Scott v. Pettit*, 3 Bos. & Pull. 469. We have no illustrations, in Scotland, of delivery after sequestration; but it is probable that it would not be held that the interim-factor, or trustee, can take delivery of goods and rank the vender for a mere dividend. If it be law that, at any time before the date of sequestration, the state of the consignee's affairs will be equivalent to stoppage in transitu, it will not be easy to decide what juncture will create the equivalent. It is usual to regret that, in England, an act of bankruptcy has not been held the equivalent of stoppage; but we have, in Scotland, nothing equivalent to an act of bankruptcy. Notour bankruptcy appears to carry with it no effects different from those of mere insolvency, unless in so far as transactions may be reduced under the act 1696; and it would afford but a partial criterion, for a merchant may have published himself to the world as insolvent, by stopping payment, an event which would form an act

of bankruptcy in England, without being notour bankrupt. On the other hand, it would certainly be too wide a rule to hold the stoppage as tacitly existing in all cases in which the vender would be justified in exercising the privilege. In stopping, he acts on his own risk of consequences. The vendee's insolvency need not be public. The vender may know, from certain indications, that, owing to the state of the vendee's affairs, there is no chance of his being paid; and a sufficient ground for such knowledge will justify him in stopping. To hold a like state of matters to be a tacit stoppage, would create more confusion than a restoration of the old principle, that the vender may revindicate the effects sold as long as he can identify them.

BOOK III.

NOTOUR BANKRUPTCY, AND ITS EFFECT ON THE DEBTOR'S TRANSACTIONS.

The term bankrupt is, in popular language, and frequently in legal discussion, applied not only to persons in a state of notour bankruptcy, but to those who are publicly insolvent. A notour bankrupt, in the legal sense of the term, is a person who is not only insolvent, but against whom certain forms of execution, for the recovery of debts, have been carried to an extent which publishes to the world his inability to meet the immediate demands of his creditors. It has to be noticed, for the purpose of escaping vague notions of the status of a bankrupt derived from the analogy of English practice, that the existence of notour bankruptcy is not a general disqualification, operating on the bankrupt's power to transact business, incur obligations, or dispose of property, but merely affords the criterion at which certain arrangements for the general benefit of creditors, precisely limited by statute, are to take place. An act of bankruptcy in England, while it, in theory, divests the debtor of the management of his estate, leaving valid only those transactions which have been, by statute, excepted from its nullifying operations, yet does not require so stringent an application of concurring attestations of ruin as that which is necessary to create notour bankruptcy in Scotland. Fraudulent preferences to creditors, of the character which would come within the act 1621, in this country,—the denying oneself to creditors,—evasion, or concealment; in one case the beckoning an officer out of an office where writs of imprisonment are prepared, to ask if such a writ had issued, (*Robson v. Rolls*, 9 Bingh. 648,)—such acts as in Scotland are held to show nothing more than mere insolvency, are there acts of bankruptcy. On the other hand, however, in Scotland, notour bankruptcy is a status which may be incurred by any debtor. The English act of bankruptcy is confined to the trading persons whose estates may be distributed under the system of mercantile bankruptcy. In Scotland, the character of notour bankruptcy, without any additional

process, produces its effect in equalizing diligence, and conferring a right to reduce alienations. In England, the act of bankruptcy is nothing, unless it receive force from a subsequent fiat and adjudication in bankruptcy, corresponding to our awarding of sequestration, brought within a certain limited time after the act of bankruptcy, fixed, by 5 & 6 Vict. c. 122, § 7, at twelve months. The judicial proceedings are held to retroact to the date of the act of bankruptcy, by what is termed "relation;" and thus an act of bankruptcy has, perhaps, as much in common with the first deliverance in a sequestration, from which the debtor's commercial bankruptcy dates with us, as with our notour bankruptcy. The inconvenience of making proceedings, which were neither judicially instituted nor proclaimed to the public, have the effect of divesting a man of the management of his affairs, was strongly felt as a defect in the English bankruptcy system; and a series of legislative provisions, commenced by Sir Samuel Romilly, have been passed, rendering valid *bond fide* transactions coming between the act of bankruptcy and the fiat. The last of these is 2 & 3 Vict. c. 29, which protects almost every description of fair dealing occurring during that interval.

Equalization of Diligence.

Under the head of the ranking of creditors, it was necessary to consider the effect of notour bankruptcy in equalizing diligence, and reference must be made to that part of the work for what is wanting in connexion with the subject in the present. See as to ARRESTMENT, p. 96; as to POINDING, p. 102.

CHAPTER I.

PROCEEDINGS BY WHICH NOTOUR BANKRUPTCY IS CREATED.

SECT. 1. IMPRISONMENT.

(236.) Any person who is insolvent may be made notour bankrupt, by being imprisoned on horning and caption, according to the old form, or on a warrant by the Court of Session, or the Sheriff, according to the form prescribed by 1 & 2 Vict. c. 114.

1696, c. 5.—§ 35 of the 1 & 2 Vict. c. 114, provides, that the diligence executed in terms of the act shall be of the same effect as if executed by horning and caption; and there can be no doubt

that the clause extends to the Sheriff's warrants. An instance of bankruptcy so founded occurred in *Sutherland v. Sutherland*, 11th Feb. 1843, 5 S. 544.

The terms of the act 1696 as to the existence of insolvency, in connexion with the other criterions, are, "and who shall afterwards be found, by sentence of the Lords of Session, to be insolvent." This might admit of two meanings, neither of which is consistent with the interpretation of the act in practice, and the obvious intention of its framers: 1st, That, if insolvency be found to exist at any future time, by decree of the Court it is not necessary that it should have existed contemporaneously with the imprisonment. 2d, That legal bankruptcy does not exist, unless and until the fact of insolvency has been found by a declaratory decree of the Court. It is never disputed, however, that the insolvency must be contemporaneous with the other criterion, and that the judicial declaration of its existence, if the fact of bankruptcy be questioned in a litigation, is a sufficient judicial declaration. The law appears to have been so fixed by the case of the competition of Forbes's creditors, 5th Jan. 1712, M. 1087.

(237.) *What Warrant?*—The statute requiring that the imprisonment should be on horning and caption, which is the diligence of the Court of Session,—imprisonment on an act of warding, or on any other diligence not statutorily declared to be equivalent to horning and caption, will not suffice.

Snodgrass & Haldane v. Beat's Creditors, 13th Nov. 1744, M. 1095, as to acts of warding. Imprisonment under the small debt acts would have been an exception; but it is abolished by 5 & 6 W. IV. c. 70. Imprisonment on a writ of extent, or any of the warrants of imprisonment authorized by the revenue statutes, will of course be insufficient to satisfy the requisites of the act, and so imprisonment on a criminal warrant. See *Marshall v. Irvine*, as cited below.

(238.) *What is Sufficient Imprisonment?*—It is not necessary, to satisfy the requisites of the act, that the debtor must have been within the walls of a prison, provided he have been actually, and with the proper formalities, taken into custody by the officer.

Woodstone's Creditors v. Scot, 27th Feb. 1756, reversing the decision of the Court of Session, 18th Feb. 1755, M. 1102. The House of Lords found that the debtor "having been arrested, and actually in custody of the messenger," "was imprisoned within the true intent and meaning of the act of Parliament 1696." The judgment was followed in *Macadam v. Macilwraith*, 23d Nov. 1771. *M. Bankrupt*, App. No. 8. in *Fraser v. Monro*, 5th July 1774,

M. 1109, and in *M'Math v. M'Kellar's Trustees*, 1st March 1791, Bell's Cases, 22. In *Elliot v. Scot*, 3d March 1768, M. 1108, the principle appears to have been departed from, the report bearing that "the Lords found, that, although the principal debtor be proved to have been in the custody of a messenger, in virtue of letters of caption, yet this, joined with insolvency, is not sufficient to constitute him a bankrupt, in terms of the act 1696." An observation dropped from the bench, in the case of *Ewing*, referred to below, to the effect that the case of *Woodstone* in the House of Lords "seemed to have been decided from views relative to the English practice, where custody in the hands of the bailiff, in a spunging-house, precedes putting in the common jail, in all cases, if the debtor chooses it; and where this is a sort of imprisonment, that has all the effects of actually putting in jail." This remark is probably just; but the rule laid down by the House of Lords is now universally acknowledged as strict law.

It appears, however, that if there be any thing on the face of the proceedings showing that it was not the intention of the officer to seize the debtor and commit him to prison, but merely to convey an emphatic threat of such ultimate proceedings, the diligence will be insufficient. Thus, in *Maxwell and others v. Gibb*, 17th Nov. 1785, M. 1113, there was found to be no bankruptcy, the messenger's execution merely bearing, that he "had apprehended the debtor, but that, without imprisoning or taking him into custody, he had afterwards liberated him on promise of payment." Referring to this case, Mr Darling says, "Where, as sometimes happens, the creditor is desirous to avoid creating a bankruptcy, but at the same time to endeavour to recover his debt under the threat of incarceration, he may apparently accomplish his object by instructing the messenger to apprehend, but not incarcerate, and to liberate him if payment be not made. Clear written instructions should be given if such an object be contemplated. It is proper, however, that an execution should be returned by the messenger and witnesses at the time or immediately afterwards, setting forth the *res gesta*, i. e. what actually took place." (*Office of a Messenger*, p. 177.) See *Richmond v. Dalrymple*, 14th Jan. 1789, M. 1113. In *Ewing v. Jamieson*, 17th May, 1808, M. *Bankrupt*, App. 27, the messenger returned no execution; and it appeared in evidence, that he did not display his blazon, or in any manner execute the caption, but, notifying that he had such a writ in his possession, induced or compelled the debtor to proceed with him to the office of the creditor's agent, where, after having been detained an hour, he was released by consent of the agent, who had not given instructions for actual apprehension and incarceration. The majority of the Court, holding that the journey to the office was "enforced, no doubt, by the power of executing the caption, but not by the actual execution of it," found that there was no bankruptcy. *Lamont v. Stewart*, 17th Jan. 1808, M. *Bankrupt*,

App. 29, was another case of circumstances. The messenger deponed that he considered that he had the debtor in custody. He found him in Kilmarnock, and they went together to Glasgow, where, with little delay, they went to the creditor's place of business, where a negotiation took place, and the debtor was set free at the instance of the creditor. There was no execution. The messenger deponed to having his caption with him, but he did not remember whether he had shown it. He had not read it over, because it was "never his practice to read over his caption to a debtor." He did not display his blazon to the debtor, "nor did he touch him with his wand of peace, and say that he was his prisoner, in so many words, but gave him to understand that he was so." This was found not to produce bankruptcy. In *Blaikie v. Cleggs*, 21st Jan. 1809, M. Syn. 58, the same view was taken in a case where the evidence showed that the messenger stepped up to the debtor on the street, and said, "I must have money;" and the two adjourned to a tavern, where the money was paid.

(239.) *Instructions to Countermand*.—When the officer has received the competent warrant, and duly executed it, it is no objection to the imprisonment, as an ingredient in bankruptcy, that instructions have been given to countermand the execution, if they have not reached the officer; or that a sist has been obtained, but has not been intimated.

National Bank v. Johnston, 29th Nov. 1842, 5 S. 205. This was a case of special circumstances, opening some important and undecided points. At the close of business hours a banking company in Edinburgh despatched a warrant to their agent in Orkney. The debtor obtained on the same night a sist on a bill of suspension, of which he sent intimation to the manager and secretary at their dwelling-houses between the hours of ten and eleven o'clock. The intimation was sent by letter. No measure was adopted to call attention to it, and it does not appear to have been seen that night. After the delivery of the intimation, however, a communication might have been sent to Orkney by the same post which conveyed the warrant: the time of closing the box was half-past four next morning. Next day the bank agent wrote, countermanding execution of the diligence, but it had been already executed. The trial of the validity of the execution arose on objections to awarding sequestration. It resolved itself into three questions,—1st, Whether the existence of the sist invalidated the diligence? 2d, Whether, if it did not, the sending of intimation in time to be communicated to the messenger, invalidated the diligence, though the communication had not been made? 3d, Whether the existence of a countermand by the creditor, though it had not reached the messenger, was equivalent to coun-

termending the diligence? The diligence was found effectual. The first question was greatly cleared by the circumstance, that the note of suspension, on which the sist had proceeded, had been refused. At the time, therefore, of the judicial consideration of the question, though there had been a temporary authority to stop proceedings, which had been too late for use, the foundation of the proceedings was found to be correct, and the sist uncalled-for. The judgment, in so far as respects the intimation, rested in a great measure on its having been given after business hours; when, though it was possible that it could have been acted on, it was not reasonable to expect it to be attended to. The Lord Justice-Clerk said, "I cannot enter into the notion that people are to be at their desks all night, and to put letters into the post-office before four in the morning." But this consideration of specialties left open the important general question, whether, in the case of an officer having received a valid warrant, a formal execution of it by him can be invalidated by any thing either done or neglected to be done by agents or others, to which he is no party?

(240.) *Vitiated Warrant*.—Apprehension on a warrant which is vitiated will not be an imprisonment to constitute bankruptcy.

Duncan v. Houston, 13th Feb. 1833, 11 S. 383. This case shows that where, in the part of the warrant which authorizes the officer to seize the debtor, the debtor's name is written on erasure, that warrant is bad. The letters of caption proceeded on the narrative that "Richard Scougall & Co. as a company, and James Brunton and James Thomson as individuals," were orderly denounced. The names James Brunton and James Thomson were written on erasure. In the will of the caption all the three names were written on erasure. The execution referred to Richard Scougall, the only name which was not an erasure in the narrative, but its being an erasure in the will was held to vitiate the warrant. Lord Balgray observed, "When the messenger looks to the will to discover against whom he is directed to proceed, he finds nothing but a blank, for an erasure is no better." See the case of *Cowan v. Watt*, 6th March, 1829, 7 S. 553, where a like erasure vitiated a warrant to apprehend in *meditatio fugæ*.

(241.) *Proceedings Formal*.—If the apprehension has been formal, and under a competent warrant, the bankruptcy will not be assailable, on the ground of the constitution of the debt or the competency of the diligence being still under judicial consideration, by being carried into a higher court.

For the law as to the necessary formalities, see above, par. 238. In *Sutherland v. Sutherland*, 11th Feb. 1843, 5 D. 544, the agent of the successful party in a litigation in the Sheriff Court had extracted the decree for expenses, used diligence on it, and incarcerated the debtor. After the first deliverance in a sequestration, the bankrupt presented a note of suspension of the diligence, and of the decree, and opposed the awarding of sequestration; but the objection was overruled. In *Ker v. Scot*, 20th Feb. 1829, 7 S. 438, affirmed on appeal, 4 W. S. 441, it was alleged that the denunciation was premature, and that on this ground a bill of suspension and liberation had been brought, which, being refused, had been carried to the House of Lords. The question was raised on the old sequestration statute, which, requiring instant consignation, or payment of the debt on which the diligence proceeded, as the ground for refusing the application, sequestration was awarded. A nice question may sometimes occur, how far an informality is disconnected with the warrant and its execution, so as to require a previous judicial reversal of the diligence before it can be pleaded, or is an essential part of the execution, which must be an element in the evidence of bankruptcy? See *National Bank of Scotland v. Johnstone*, 17th Dec. 1836, 15 S. 289, where certain objections were stated as to the registration of the execution of horning and the denunciation, and were repelled.

It is not easy to find a rule for the effect of a reduction of the diligence. That a person should be legally bankrupt on a diligence which is judicially annulled, seems contrary to principle. In *M'Hardy v. Adam*, 18th June 1833, 11 S. 735, it seems, however, to have been held, that if any thing be done, while the diligence is unreduced, which gives any person a right to plead bankruptcy, a subsequent reduction of the diligence to which he is not a party, will not affect his right to plead the bankruptcy. The bankruptcy rested on an execution of search, which was reduced as against the heirs of the creditor, who used it after his decease. Other creditors pursuing a reduction of a deed granted within the sixty days, were not precluded by this reduction. It was said, that to have been efficacious against all the creditors, they should all have been made parties to the reduction.

It lies on the person averring bankruptcy to prove it. Where there is no incarceration, the officer's execution will be the best evidence of an apprehension; but that the fact may be proved by extraneous evidence is shown in the cases cited above, and was specially decided in *Richmond v. Dalrymple's Trustees*, 14th Jan. 1789, M. 1113.

SECT. 2.

METHODS OTHER THAN IMPRISONMENT.

(242.) *Absconding, &c.*—A person insolvent, and against whom any writ of imprisonment has issued, as per par. 236, becomes bankrupt if he seek the sanctuary as a protection, or flee or abscond for his personal security, or defend his person by force.

As to the essentials to the validity of the writ, see above, pars. 240, *et seq.*

The most substantial evidence of the debtor's not being found, is the officer's return of an execution of search. It would appear, that if absconding be alleged, the execution will be sufficient to throw on the debtor the burden of proving that he had not absconded. *Mudie v. Dickson*, 14th Nov. 1764, M. 1104; *Ferguson v. Smith*, 1771, M. 1109; *Carron Company v. Berrie*, 4th July 1775, M. 1110; *Ross v. Chalmers*, 25th June 1782, M. 1111; *Young v. Grieve*, 4th July 1783, M. 1112; *Stebbing v. Hodgson*, 9th Aug. 1785, M. 1113; and see *M'Hardy v. Adam*, 18th June 1833, 11 S. 735. In some of these cases, a disposition was shown to hold the evidence conclusive; but, in general, the doctrine specially laid down in the case of *Stebbing*, seems to have ruled, that "not being a *presumptio juris et de jure*, it may be elided by a contrary proof." Absconding appears to be the proper plea, where the debtor cannot be found, yet is not presumed to have gone abroad.

When the debtor leaves the kingdom, to avoid being apprehended, he comes under the branch of the act relative to fleeing. This branch of the act is not of much practical importance, as there is another criterion of bankruptcy for persons abroad, and there are few decisions in illustration of it. In taking an analogy from a like branch of the English bankrupt law, a departure in pursuance of the debtor's own business, should not bring him within the act; but, in *Davidson v. Brown*, 29th June 1737, M. 1092, bankruptcy was found to have been incurred by one who, as a sailor and merchant, had gone abroad on his own business before the date of the caption. The presumption was eked out by the length of time during which the debtor remained abroad, a circumstance which would of itself, in England, be an act of bankruptcy under the second alternative of the clause—"If any trader shall depart this realm, or, being out of this realm, shall remain abroad." (6 Geo. IV. c. 16, § 3.) This alternative was inserted in the last English statute, to meet those cases where the departure had not been to defeat creditors, while the debtor, having departed with different views, continued abroad with that object. It has been already remarked that, in England, the conjoined elements of an attempt to defeat the demands of creditors, and

insolvency, are not required; but, virtually, proof of any of those acts of bankruptcy in England, which consist in keeping out of the way of creditors, must contain a proof of professed inability in the debtor to pay his debts, as the intention with which the act is done, as an essential element in its character, must be proved. If this intent be not shown, the fact that the creditors actually are defeated is not material: "As, where one goes abroad to avoid a criminal process, or a writ *de excommunicato capiendo*, or a process to enforce a duty, as a decree to execute a conveyance." Henley's Bankrupt Law, 17. It will be observed, that the case of Davidson occurred anterior to the measure for making a person who is furth of the realm bankrupt. It is pretty clear, that at the present day, the being abroad consequent on a journey not made with the view of avoiding a caption, would not be admitted to make out notour bankruptcy by fleeing. It has been decided on a principle analogous with that which, as above stated, rules in England, that evidence of an escape from a criminal charge is not sufficient evidence of absconding or fleeing under this branch of the act. *Marshall v. Irvine*, 11th Dec. 1834, 13 S. 179, where letters of horning and caption had been raised, but there was no execution of search within the prescribed period, and a sentence of fugitation by the High Court of Justiciary was produced. Lord Gillies said, "It is not enough that the debtor absconds *de facto*; he must do so to avoid the diligence of his creditors. The statute requires him not only to be under legal diligence for debt, but also, 'in virtue thereof,' to be imprisoned or to flee."

Forcibly defending will generally be proved by the officer's execution of deforcement; and, as in the case of absconding, that instrument will probably throw the burden of proof to the contrary on the party opposing the bankruptcy. Both this criterion and that of retirement to the sanctuary are palpable circumstances which can be easily proved.

(243.) *Arrestment*.—An insolvent who is furth of Scotland, or who is not liable to be imprisoned by being in the sanctuary, or by reason of privilege or personal protection, may be made bankrupt by a charge of horning, or a charge according to the 1st and 2d Vict. c. 114, being executed against him, accompanied by an arrestment in execution of any of his effects not loosed or discharged within fifteen days of its date.

54 Geo. III. c. 137, § 1; 1 & 2 Vict. c. 114, §§ 3, 35. In *Blackburn*, petitioner, 22d Feb. 1810, M. Syn. 72, under the like clause in the previous sequestration act, this was found the legitimate means of rendering a person domiciled abroad, having estates in Scotland, bankrupt. By *White's executors v. Butter*, 25th Nov. 1800, M. Bankrupt, App. No. 12, it was found to

apply to debtors seeking sanctuary in the Abbey. The horning will be executed edictally according to the 6th Geo. IV. c. 120, § 51. The act requiring arrestment in execution, arrestment in security will not bring the debtor within it; see *Marshall v. Irvine*, 11th Dec. 1834, 13 S. 179. It appears to be considered in practice, in the general case, necessary to have an execution of search against the debtor, to show that he is out of the kingdom; but, in *Cheyne v. Walker*, 26th Nov. 1828, 7 S. 60, where sentence of fugitation had been passed against him on an indictment before the Circuit Court of Justiciary, further evidence was considered unnecessary. The distinction between being out of the kingdom at the time when the diligence proceeds, and fleeing from the country to avoid it, will be kept in view, as noticed above.

(244.) *Poinding*.—An insolvent in any of the positions described in par. 243, may be made bankrupt by an execution of charge, as above, accompanied by an execution of poinding of any of his moveables.

54 Geo. III. c. 137, § 1. See pars. 241, and 243, and corresponding commentary. On the subject of the execution of poinding, see above, p. 103.

Professor Bell suggests, that as poinding, arrestment, &c. were intended as a succedaneum to imprisonment on a charge of horning, the spirit of the provision would require that the diligence against property should take the precise place of the imprisonment, by following the charge of horning, and being an execution for the same debt. He mentions, however, the case of *Cooper*, 12th Feb. 1807, in which the court was of opinion that the charge need not precede the arrestment, 2 B. C. 175. It may be observed, that in the 33d Geo. III. c. 74, § 2, on which this opinion proceeded, there were grounds for supposing that the two operations must be done in the course of continuous diligence for the same debt, which are not to be found in the later act, in the words “and from and after *the last step* of such diligence the said debtor, if insolvent, shall be holden and deemed a notour bankrupt,” &c. There seems to be no reason for narrowing the construction of the existing statute, or for holding that any thing more is required to constitute bankruptcy than the co-existence of the charge either under the old or the new practice, with the prescribed diligence against property.

(245.) *Adjudication*.—An insolvent in any of the positions described in par. 243 may be made bankrupt by an execution of charge, as above, coupled with a decree of adjudication of any part of the debtor's heritable estate for payment or security of debt.

54 Geo. III. c. 137, § 1. See pars. 241, 243, and 244, with accompanying commentary, and on the subject of adjudication, p. 78, *et seq.*

(246.) Sequestration under the act 2 & 3 Vict. renders the debtor or company, whose estate is sequestered, notour bankrupt from the date of the first deliverance, without prejudice to any preceding bankruptcy.

2 & 3 Vict. c. 41, § 25. See Book IV.

SECT. 3.

PERSONS WHO MAY BE MADE BANKRUPT.

(247.) The decisions have not afforded the means of limiting precisely the classes of persons who may be made notour bankrupt; but, in the absence of any better criterion, it may be safely held, that all persons against whom personal diligence may proceed according to the act 1696, or who are only saved from it by the incidental circumstances provided for in the 54th Geo. III. may be made notour bankrupt. On this principle, and on the case of *Churnside v. Currie*, 11th July 1789, M. 6082, as lately confirmed in that of *Orme v. Diffors*, 30th Nov. 1833, 12 S. 149, there can be little doubt that a married woman, whose husband is furth of Scotland, and who conducts business for her own behoof, may be made bankrupt. Professor Bell thinks that pupils, idiots, or lunatics, may be made bankrupt, under the provision as to persons who may be protected from imprisonment by privilege. (2 B. C. 166.)

(248.) *A Partnership*.—An insolvent company is rendered bankrupt by such proceedings against a partner for a company debt, as would render that partner bankrupt were the debt his own.

In *Selkrig v. Dunlop & Co.* 30th May 1804, H. 277, it was found, that the partner of a firm was made bankrupt on a charge for a company's debt, on a bill granted by the firm, though the partner's own name was not in the words of the firm. The reporter says, "See the case of *James Thomson v. Andrew Liddell & Co.* 2d July 1812, where 'the court were unanimously of opinion that it is competent to charge the individual partners of a company upon letters of horning directed against the firm, and that it lay with the messenger to discover who the individuals composing the company were.'"

The paucity of decisions on this subject may be attributed to the circumstance of mercantile companies being liable to bank-

ruptcy by the sequestration act on the notour bankruptcy of a partner for a company debt, and to mercantile bankruptcy being the form in which partnerships will, with few exceptions, have questions regarding their bankruptcy judicially examined. Professor Bell (2 B. C. 168) presumes, from the terms of the report of Johnston v. Fairholm's trustees, 18th Dec. 1770, M. *Bankrupt*, App. No. 5, that it was on that occasion taken for granted that a company might be made bankrupt by diligence against the partners for a company debt. In the case of Duncan v. Houston, 13th Feb. 1833, 11 S. 383, noticed above (p. 201,) the Lord Ordinary, (Moncreiff,) in his note, said, "Certainly it is too late to maintain that a trading company cannot be made bankrupt under the act 1696; and equally hopeless to allege that to effect this all and each of the partners must be made bankrupt,—that being in very many cases impracticable. The principle is, that if a company suffers a partner to be laid under ultimate diligence for a company debt, it thereby publicly confesses insolvency as a company, and is justly held notour bankrupt." It is to be presumed that the ingredient of insolvency is not necessary in the person of the partner besides its existence in the company.

SECT. 4.

EXTENT OF THE RIGHTS CREATED BY
COMPLETED BANKRUPTCY.

(249.) The status of bankruptcy, when once created, is one in which all the bankrupt's creditors have a *jus quæsitum*, which will not be defeated in regard to the others, by the act of the creditor using the diligence, or by any creditor reducing it.

M'Kellar's Creditors v. M'Math, 1st March 1791, M. 1114; M'Hardy v. Adam, 18th June, 1833, 11 S. 735. See this case specially noticed elsewhere, (p. 202.) "After a person has been legally rendered bankrupt by proceedings at the instance of one creditor, the bankruptcy forms a *jus quæsitum* to all his creditors, which cannot be removed, either by a transaction between the bankrupt and the creditor who uses the diligence, or by the judgment of a court, in which they alone are parties." Note by the Lord Ordinary, Corehouse. On this principle, the payment of the debt on which the bankruptcy proceeded will not remove it. See Hopeton v. Nisbet, 9th Nov. 1750, M. 1098. See above, as to the question how far a reduction of the diligence may affect the question, p. 202.

CHAPTER II.

REDUCTION OF PREFERENCES UNDER THE ACT 1696.

SECT. 1. TRANSACTIONS COMING WITHIN THE ACT.

(250.) "All and whatsoever voluntary dispositions, assignments, or other deeds, which shall be found to be made and granted, directly or indirectly," by a bankrupt, "either at or after his becoming bankrupt, or in the space of sixty days before, in favour of his creditor, either for his satisfaction or farther security, in preference to other creditors," are declared "to be void and null."

1696, c. 5.

In calculating the sixty days, the day on which the alienation or security is granted, is counted the first day, and if the bankruptcy do not take place till after the expiration of the sixtieth day by such calculation, the proceeding will not be affected. In calculating back from the bankruptcy to the deed, the day of the bankruptcy is the first of the sixty, and the transaction is not affected unless it come within the sixty days thus computed, *Blaikie v. Cleggs*, 21st January 1809, F. C. where there was no necessity for deciding the point, but where it was distinctly laid down.—An indorsation was made on the 30th March, and the bankruptcy was alleged to have taken place on 31st May. The principle was confirmed in *Anderson v. Starkie, &c.* 2d March 1813, F. C. and in *Scott v. Rutherford*, 9th Dec. 1839, 2 D. 206. See above, p. 97. The principle adapted to the act, which immediately precedes this in the statute-book, for the reduction of alienations from the heir-at law on death-bed, appears to be the same. The maxim, *dies inceptus pro completo habetur*, is applied; but then the day of granting the deed must be considered a free day, and the sixty days must begin to run from its conclusion. See *Ogilvie v. Mercer*, 10th Dec. 1793, M. 3336. The same principle of reckoning seems to have held in England, while the 6 Geo. IV. c. 16, § 81, securing *bonâ fide* transactions with a debtor within two calendar months of his bankruptcy, remained in force. In *ex parte Farquhar*, (1 Mont. & Mac. 7.) Sir John Leach, Vice-chancellor, "was of opinion that one day must be reckoned inclusive, and the other exclusive." In another case there cited, *Thomas v. Desanges*, it seems to have been taken into consideration, that reckoning *de momento in momentum*, about an hour more than two months had elapsed; but the other principle seems to have been the ground of the decision.

(251.) *Money Payments*.—Payments in cash of debts

due at the time of payment, are not affected by the act ; and under the head of cash are included bank-notes and drafts on bankers.

Buchanan v. Arbuthnot, 25th Jan. 1733, M. 1128, *Forbes v. Brebner*, 26th Jan. 1751, M. 1128. As to drafts, see the case of *Blinchow's Trustees*, cited below. Professor Bell reports the case of *Ferrier v. Newton*, 2d June 1808, in which a draft to meet a bill falling due was not struck at, 2 B. C. 218. But see, farther on, as to anticipatory payments, and transferences of money fraudulently made to assume the appearance of payments.

The object of the act is to reduce preferences given to particular creditors, in contemplation of bankruptcy, and with the intention of diminishing the fund on which the creditors at large would rank ; but of letting payments made in the usual course of business stand good. The most difficult point in the application of the act to practice, is in drawing a line between payments, and reducible preferences, through security or conveyance. If all payments were made in bullion, the distinction could be easily kept ; but it is not, as will be seen below, so easy to draw the line in reference to paper currency. The reason why payments in money are not struck at by the act, is generally said to be because money in a man's pocket not being affectable by any legal diligence, the debtor's employment of it ought not to be subject to challenge. Thus, the reporter (*Monboddo*) of the case of *Stirling, &c.*, 16th Nov. 1752, 5 B. S. 800, says, "the reason of the difference seems to be, that money in the debtor's pocket cannot be affected by any form of diligence known in our law, and he may squander it or do with it what he pleases ; so that by giving it in payment to one creditor, he is not supposed to prejudice the rest ; whereas, goods in the debtor's possession may be carried off by pointing ; so that the debtor, by giving them away in payment to one creditor, is understood to give him a partial preference." But there appears to be a reason for the distinction more consonant to the principles on which the law of bankruptcy is founded. So long as a man is paying his debts in cash, he not only appears to other people, but generally feels himself to be, exempt from any immediate risk of bankruptcy ; and there is no reason to suspect connivance on the part of the creditor who is paid, or even on the part of the debtor an intention to reduce the fund available to his creditors at large. But when goods are removed from the debtor's warehouses, and given to the creditor, or when the latter, having been content with a personal security on which he would rank equally with others, gets an heritable one, on which it is intended that he shall have a preference,—such acts carry on their face a presumption of collusion, and are therefore wisely struck at.

But there is another view of this subject, which was opened up by Lord Fullarton in his opinion of the proper interpretation of the terms of the act in the case of *Gibson v. Forbes*, 9th July

1843, 11 S. 916. According to this view, the act was not intended to strike at the fulfilment of a bargain, either by payment on the one hand, or delivery on the other; but against any method of satisfying the creditor, which, from its being other than the prestation originally stipulated for, proclaims the debtor's inability to meet his obligations, and at the same time his desire to go out of his way to favour an individual creditor. This opinion will be found cited more at length elsewhere, but in reference to this his Lordship says, the statute "appears to have been directed, not against payment in the proper sense of the term, that is, the actual performance which the creditor was bound to accept of, in extinction of the debt as originally constituted, but against satisfaction, *i. e.* those substitutes for such actual performance, which could only be the result of a new and voluntary arrangement between the debtor and the creditor." It is observable, however, that the adoption of this doctrine in its full extent would militate against many decisions under the act, *e. g.* those which have reduced deeds granted in fulfilment of prior obligations.

(252.) *Bill Transactions*.—In the case of a debtor and creditor living in the same place, if the debtor indorse to the creditor a bill, not as part of a series of transactions which stand against each other in a current account, but as a distinct provision for a specific debt, the transaction will come within the act.

A distinction is taken between such a transference when the two parties are in the same place, and other ready means of payment are practicable; and the case where the distance of the parties gives room for the supposition, that the transmission of the bill may have been simply adopted as the most convenient method of making payment. *Campbell v. Graham*, 16th Jan. 1713, M. 1120; *Campbell v. Macgibbon, &c.*, 10th Aug. 1780, M. 1139. It must be remembered, however, that even this last is a comparatively old decision, and that, with reference to subjects very nearly similar, the law, as will presently be seen, has of late been considerably modified. In the case of *M'Hutcheon v. Welch*, 20th May, 1794, (2 B. C. 217, and not elsewhere reported,) bills and drafts sent to a distance were reduced; but the Court seemed to found upon the circumstance, that the creditor was aware of the debtor's insolvent position—a circumstance into which, as will presently be seen, it is now held irrelevant to inquire. Professor Bell says, "Where a bill is due at a bank, and in due course a remittance is made to the bank by sending to be discounted another bill for the amount, the statute is held not to apply," (2 B. C. 218,) and he refers to the unreported case of *Jameson v. Ferrier*, 23d Jan. 1810. He holds that a draft to meet a bill falling due is not struck at. As shown farther on, it does not appear that any draft is now held within the act, unless it be for a debt that has

not become due. In *Ritchie v. Wyllie*, 27th Nov. 1821, 1 S. 168, a bill drawn to meet the drawer's acceptance on a creditor, and paid, was struck at.

Although the debtor's acceptance or promissory note for the amount of a debt will improve the creditor's position, by giving him the advantage of summary diligence, it was decided, though in a comparatively old case, that such a document being merely a "promise to pay, and not a disposition, assignation, or other deed," does not come within the act, *Cowan v. Mansfield's Trustees*, 7th Jan. 1762, M. 1167. Mr Thomson (on Bills, p. 693.) appears to doubt if this decision now represents the law. He refers, as contradicting it, to that of *M'Kellar's Creditors v. M'Math*, 1st March, 1791, M. 1114, which was a case as to a bond of corroboration, enlarging the debt, and superadding a penalty. The decision was pronounced by "a very narrow majority." The case of *Dunbar's Creditors v. Grant*, 18th June 1793, M. 1027, has also been referred to as contradicting that of *Cowan*; but this case bore on the second branch of the act 1621, which gives a creditor pursuing diligence a personal claim of reduction against any act interfering with it. If it would not be safe to hold the case of *Cowan* as fixing the law, there is certainly no better foundation for the opposite view. See below, par. 261.

(253.) The transmission to a creditor of an acceptance by a third party, avowedly to provide for a debt which the debtor admits that he cannot otherwise meet, and of which the creditor wishes direct payment, is struck at.

White v. Briggs, &c. 8th June, 1843, 5 D. 1148. See this case more fully referred to below. The creditor's demand was one of urgency. The debtors, having received a bill from him to be discounted, applied the proceeds to their own purposes. The creditors urged payment, and threatened an exposure, and they reluctantly agreed to take payment through the bills and other negotiable instruments transmitted to them.

(254.) The replacement of bills indorsed but not accepted, by bills accepted in consideration of a separate security granted to the acceptor by the debtor, is a transaction struck at by the act.

Miller v. Low, 11th Dec. 1822, 2 S. 77. Here Duncan indorsed bills to a bank, which were refused acceptance. In place of them, and before the term of payment, he gave the bank a bill drawn on his son, which the latter accepted, after having received an heritable bond from his father, on which he was infest. This bill was reduced, except in as far as it could be operated upon against the acceptor. In *Miller v. Duncan & Low*, 8th Dec. 1825, 4 S. 283, the security granted to the son was reduced.

(255.) *Bill Transactions in the course of Trade.*—

When, in the course of transactions between a commercial man and his bankers or agents, in which he is in the practice of transferring to them negotiable instruments, to be discounted and credited, or to lie over till they come to maturity, paper of this description happens to be transmitted within the sixty days, it is not struck at by the act.

Stein's creditors *v.* Sir William Forbes & Co., 1st March 1791, M. 1142. There was here a strong case, in equity, in favour of the holders of the bills. If they could have been placed in the position in which they were at the commencement of the sixty days, they would have been gainers. The balance against the bankrupt was, before the commencement of the sixty days, £9868, 16s. 5d., and at the date of the bankruptcy it was £34,646, 11s. 10d. Thus, by the whole transaction, instead of being favoured over the other creditors, through a special security, the banking-house were great losers. Had the nature of the transaction, however, been an heritable bond, granted for previous debts, no equitable considerations arising out of new advances, made thereafter by the banking company, would have saved such a deed from being struck at by the act. The application, indeed, of the act to the equity of individual cases, would destroy its efficacy as a fixed rule; and it must be held that this decision settled that, without reference to the state of the balance between the parties, the act does not affect a series of bill transactions on a running account. This decision was followed in *Richmond and Freebairn's Trustees against the Pelican Insurance Office*, 26th June 1805, M. *Bankrupt*, App. No. 24, where the account was between an insurance office and its agency; and in *Richmond and Freebairn's Trustees v. Smith*, 2d June 1808, ib. No. 28, where it was between underwriters and insurance brokers. See also *Robertson v. Ogilvie*, 21st Nov. 1798, M. App. *Bill*, No. 6.

(256.) It has been found, that where creditors were the regular bankers of the bankrupt, and had opened an account-current with him, his indorsations of bills and drafts to them, when shown to be in the usual course of business, though in reality applied to paying off, by instalments, a previous bond-debt, were not struck at by the act.

Blinco's Trustee v. Allan & Co. 3d Dec. 1828, 7 S. 124; 22d Jan. 1831, 9 S. 317, App.; 28th Aug. 1833, 7 W. S. 26. The principle, as stated above, was decided in the Court of Session, and approved of on appeal. As will be explained in connexion with the next paragraph, the method of adjusting the pleadings for the purpose of bringing out the matter of fact in relation to

its bearing on the principle, adopted in the Court of Session, was altered by the House of Lords. In this case, there were none of those circumstances giving the bankers an equitable claim which characterize the case of Stein; and it seems pretty clear that, were it not for the maintenance of the fixed principle, that indorsations to bankers, on a running account, do not come within the act, the indorsations would have been reduced.

The bankers, Allan & Co. had advanced to Blincow, the person who became bankrupt, a sum on a personal bond, with securities, repayable by three equal instalments. They then opened two accounts with him, the one relative to the bond, the other an account-current. The first instalment was paid by transferring a sum from the current to the bond account. After the second instalment was due, Blincow (having got additional security, without which Allan & Co. refused to give him all the discounts he wanted,) operated on his account by bills and drafts. He then indorsed bills and drafts to an amount exceeding the second instalment; and, on a draft being presented to the amount of the instalment and interest, the same was debited to his current and credited to his bond account. He then, partly by cash payment, partly by discounting bills, had a sum standing to his credit, slightly exceeding the third instalment; on this he drew to the extent of the third instalment, *before it became due*, directing the amount of his draft to be debited to his current, and credited to his bond account, as in the case of the second instalment. The indorsations applicable to the extinction of the second and third instalments came within the sixty days, and a reduction was brought of both sets of transactions. It is very clear, that if there had been no current account, and that if the indorsations of the bills had, as they dropped in, been placed to the extinction of the bond debt, they would have come within the act. The Lord Ordinary, (Newton,) who reported the case for the opinion of the court, observed: "Had the defenders not been the bankrupt's ordinary bankers, with whom he was in use to discount his bills, there would have been little doubt that the transaction, although in the form of a discounting of the bills and an application of the proceeds, by order of the bankrupt, to the payment of his debt, would have been reducible, as falling under the spirit of the act. It is said, however, by the defenders, that, being his ordinary bankers, they discounted the bills in question in the course of trade, and only applied the balance which stood in his favour, on their running account, to the payment of the instalments of the bond, in consequence of his order to that effect." Lord Balgray observed, "A banker is entitled, in the ordinary course of his business, to discount a bill either by means of cash, or giving credit to the last hour previous to a person's avowed bankruptcy, provided it is done fairly, and without reference to any unlawful object. So far, therefore, as relates to the discounting of the bills in question, and placing the proceeds to the credit of the bankrupt, it is clear that no objection can be made.

The bond debt, however, is what creates the difficulty. The payment of the first instalment is not challenged; but it is said that, as the second was past due, and the payment was made within sixty days of the bankruptcy, it is liable to challenge. There was, however, nothing to prevent Blincow from paying it with so much cash; and as Allan & Co., as his bankers, had money belonging to him, he was entitled to desire them to apply it in extinction of the instalment." The operations in regard to the second instalment were sustained; but the cheque for the third was set aside, and the account ordered to stand as if it had not been granted. It was held on the bench, that this being an anticipatory payment, was not "a transaction in the ordinary course of business." As will be seen below, this decision gave rise to a new inquiry, whether the money on which this third check operated was to be held as paid into the bank in the ordinary course of business?

(257.) In transactions with bankers, in which bills or drafts are discounted, or in which money is deposited, within the sixty days, the question whether this was done in the usual course of business, or for the purpose of giving a preference, is a question of fact which, if disputed, and if the transaction do not bear its character on its face, must go to a jury.

Blincow's Trustee v. Allan & Co. 18th March 1830, 5 Mur. 231. This point arose out of the question regarding the third instalment in the case noticed immediately above. Although the sums contained in the last cheque were to be restored to the position in which they were before the cheque was granted, the bankers maintained that they were entitled to hold the money in satisfaction of the debt due to them on the bond. Then came the question, whether the paper had been deposited, and the money paid in in the ordinary course of business. "The question for you," said the Lord Chief Commissioner, in taking a view of the class of circumstances which should come under the consideration of the jury, "is, whether the sum was paid in with the view and purpose of meeting the instalment of the bond, and of giving an undue preference? One strong circumstance bearing on this question is, that the bankrupt allowed diligence to be done against him for £140, without drawing out £132 which he had in the bank. If this sum was necessary to make up the instalment of the bond, is it probable or not that it was left there for the purpose of making up the sum? Were the payments made in the ordinary course of business, when the person went to the sanctuary in the course of a few days? or were they pressed forward to meet the claim on his brother?" The jury found that the funds were not paid "in the fair and ordinary course of trade, but were deposited with the view, and for the purpose, of affording to

the defenders an undue preference over the other creditors." Afterwards, a number of questions in relation to the case, (which had, through inadvertency, become involved with some difficult points of practice,) came before the House of Lords in an appeal; and, among others, the decision of the court as to the second instalment. The Lord Chancellor (Brougham) remarked in very strong terms, on the loose manner in which the pleadings were made up, maintaining that, in relation to this instalment, parties should have come to an issue on the question of fact, whether the transaction occurred in the ordinary course of business, or was intended to create a preference? *Blincow's trustee v. Allan & Co.* 28th Aug. 1833, 7 W. & S. 26. The matter went to the jury on two issues,—the first relating to the indorsations; the second, to the cheque by which the instalment was transferred from the current to the bond account,—and both involving the question whether the transactions were "in satisfaction and security of a prior debt in preference to the other creditors?" The jury found for the bankers on both issues. *Blincow's trustee v. Allan & Co.* 25th July 1834, 12 S. 948.

(258.) The circumstance that the debt which it is intended to meet is not due at the time of the transaction, will bring a preference of any kind by transference, security, indorsement, or payment of money, within the act.

This doctrine is inferred from the case of *Blincow's trustee*, (see above, p. 213,) and from the decision in the Court of Session regarding the cheque for the third instalment of the bond, the principle of which met with approval in the House of Lords. The cheque being avowedly in anticipation of a debt of which the term of payment had not arrived, the court found that it was not "in the ordinary course of business," and that it came under the act. The question whether the paying in of the money on which the cheque was an operation, was within "the ordinary course of business," being one of circumstances, was sent to a jury. But this principle is more clearly evolved in the case of *Speir v. Dunlop*, 15th June 1825, 4 S. 92; 22d May 1826, App. 2 W. S. 253; 30th May 1827, 5 S. 729. In this case John Dunlop had granted a bill to his nephew, James Dunlop, which the latter got discounted. In the meantime, John Dunlop sold heritable property to another relation, and, on the price being paid, placed a portion of it in the hands of his nephew to meet the bill, which had not then come to maturity, when it should fall due. He became bankrupt within sixty days after this transaction. A variety of other circumstances, supposed to have some reference to the merits, are discussed in the pleadings; but the above are the circumstances to which the ultimate decision referred. The question was sent to a jury, on issues which involved the questions whether John Dunlop had entered into an agreement or concert with the bankrupt for the purpose of

obtaining security or payment of his bill, and for that purpose, assisted in carrying into execution the sale of the bankrupt's property? and whether he obtained a certain sum out of the proceeds of the sale in satisfaction of the bill, or as a provision for its payment? The verdict was, that John Dunlop "did not enter into any agreement or concert" with the bankrupt "for the purpose of obtaining security or payment;" and that he did obtain the sum in question "as a provision for payment of the said bill when it became due." The court, in applying the verdict, considered that they could not step beyond its terms. "The verdict of the jury," said Lord Pitmilley, "completely negatives the allegation of concert or contrivance; and all that remains as a ground of reduction is, the payment of money to retire a bill not yet due. Payment of money, however, is one of the exceptions from the act 1696, unless when accompanied by fraud, which is now out of the question in this case. The only difficulty arises from the payment having been made before the bill fell due; but that is not now a relevant circumstance: its only effect would be as a proof of fraud, which is negatived by the jury; and in no other view can it have the effect of bringing the payment under the act 1696." The decision being against the reduction, was appealed from; and Lord Gifford, in the House of Lords, declining to give an opinion as to the question of law, thought there was one question which had not been opened up by the court below, viz. admitting that there was no fraud or collusion, and that the findings of the jury were correct, whether the circumstance, which was both admitted and found, that a sum had been advanced, within sixty days of bankruptcy, to retire a bill by the bankrupt, not due at the time, did not bring the payment under the act? The case was remitted for the court to consider whether the payment or deposit "was or was not reducible under the provisions of the statute 1696, or otherwise?" The court then reduced the payment. Lord Pitmilley justly remarked, "According to the argument now insisted on, the jury trial has been entirely thrown away;" and Lord Alloway said, "I do not see why this cause was ever sent to a jury." There were some remarks made upon the jury having found, not that the transference of the money was a "payment," but that it was a "provision for payment," and upon the remit of the House of Lords calling it a "payment or deposit." It seemed to be contended from this that the court should not view the act as a "payment," but as a "deposit," or a "provision for payment." But taking the view of the House of Lords in this case, in conjunction with its view in the case of *Blinchow*, it seems to be the simple principle, and the only one which will keep clear of confusion, that a payment of a future debt comes, in the general case, within the act. To this must be added the farther principle that when the anticipatory payment is admitted or proved, all farther inquiry—involving questions as to the motives and ulterior proceedings of the parties—is irrelevant. Lord Glenlee,

who, on the occasion of the original decision, was in favour of reduction, observed, "There may possibly be cases where payment of a bill before it becomes due, is not suspicious—as, when a party has money in his hands for which he has no immediate use, he may perhaps purchase up his own bill before it becomes due." "Payment to one who is creditor in a future debt," says Professor Bell, "seems objectionable; and if such a transaction is ever to be sustained, it must be in circumstances falling fairly within the description of discount; which, although not very usual, may innocently and in *bonâ fide* take place, where one holding the bill of a trader, and intending to discount it at a bank, the party rather chooses to retain it himself." (2 B. C. 216.)

Although the above cases seem to leave it beyond doubt, that the anticipatory payment of any contingent or future debt comes within the act, a distinction might be taken between the circumstances connected with them, and such a case as the following:—A purchaser agrees to give his bill for the price of a commodity. The nature of the bargain is afterwards changed; and the purchaser receives possession of his bill, paying in cash with a deduction of discount. The question would here, perhaps, be, whether, after one side of the bargain has been implemented by delivery of the goods, the parties are entitled, to the prejudice of the rights of creditors, to change the nature of the counter-part? If the goods were undelivered, there could, of course, be no doubt of the right of the parties to make this change.

The great extent to which the corresponding branch of the law of England differs from our system, will be noticed below, p. 230. The difference is peculiarly remarkable in relation to payments and securities to creditors whose debts are not exigible. In *Hartshorn v. Sleddon*, 2 Bos. & Pull. 582, one who was indebted by bond, on the application of the creditor, delivered goods to that creditor, as a security for the debt. The creditor was not a dealer in the class of goods so delivered. It would appear that if the delivery had been made voluntarily, and without an application by the creditor, it would have been struck at as an unfair preference, but it was held good. See also *Thompson and others v. Freeman*, 1 T. R. 155.

(259.) *Deposit*.—A deposit of a bill or other negotiable instrument, without indorsation, comes within the act.

Manson v. Angus, 16th July 1771, *M. Bankrupt*, App. No. 7. Hailes, 420. Here there being some demur about the acceptance of a bill which the debtor offered to indorse to the creditor, it was in the meantime deposited with the latter, who granted a receipt for it as a deposit, and an obligation to return it on payment of his debt. The question was introduced, whether the bill had actually been indorsed? but it was held that there was no necessity for deciding that point, as a security was meant to be accomplished by the transaction.

(260.) *Transference of Moveables.*—The transference by the debtor to his creditor, of any moveable article of merchandise or other property, either directly, or by the transmission of a bill of lading or other negotiable title, comes within the act.

Forbes v. Debtors of Forbes, 27th Jan. 1715, M. 1124. Smith v. Taylor, 19th July 1728, M. 1128. Young v. Johnston, 25th June 1783, M. 1141. Dawson v. Lauder, 4th Feb. 1840, 2 D. 525. This was a case in which the delivery of the goods was ostensibly a bargain with a third party, who invoiced them, and debited the debtor with his debt to the original creditor. The circumstances were considered so clear as to render an issue to a jury unnecessary. In White v. Briggs, &c. 8th June 1843, 5 D. 1148, one of the documents made over was a bill of lading for cotton goods shipped to India, with a relative draft against the shipment.

(261.) A security which, though it be but an acknowledgment of a debt justly due, places the creditor in a better position than he could place himself in by legal diligence, comes under the act; and so does an acknowledgment of a debt enlarging its amount, and thereby enabling the creditor to obtain a greater dividend than he would otherwise receive.

These seem to be the only points clearly settled by the case of M'Kellar's Creditors v. M'Math, 1st March 1791, M. 1114, though there were other and very important points discussed. Here a bond of corroboration included debts due to the grantee's father, and it thus saved the expense and incidental risk attendant on confirmation. It accumulated principal and interest, increased the amount of the debt, and added penalties. So far as the debt was enlarged, and a penalty superadded, it was on all hands agreed, that where this was done to an extent which could not have been attained by the operation of legal diligence, it was objectionable. The farther question, how far a debtor was entitled to improve the position of any of his creditors by simply saving him the expense and annoyance of legal diligence; and how far a simple bond of corroboration, which gives the creditor nothing which he could not have obtained by diligence, is affected, was left unsettled.

There is a case very briefly reported, Wright's Trustees v. Mill, June 1799, M. 6259, which seems to bear to a certain extent on this point. There a litigant had been found liable to expenses. Arrestments were used in the hands of his debtors, who granted promissory notes to their creditor the litigant. These were indorsed to the successful party, and by him indorsed to the

agent. In consequence of the granting of the notes the arrestments were discharged. The successful litigant became bankrupt within sixty days after the indorsations. They were found not to come under the act, the agent pleading that he might have got the decree for expenses in his own name.

There can be no doubt of a substitution of a real security for a mere personal debt coming within the act, as it is one of the class of transactions against which it was chiefly levelled. How far, on the other hand, that which is in itself a mere acknowledgment, but which by the special favour of the law becomes enforceable by summary diligence, and thus frequently an effectual means in the hand of the holder of obtaining payment, *e. g.* an acceptance or a note, comes within the act, see above, p. 210.

(262.) Although there is nothing in the act to interfere with *bonâ fide* buying and selling, or lending and borrowing, and a sale by a debtor within sixty days of his bankruptcy, for cash or bills, is good, and a security granted for borrowed money, in such circumstances is equally valid; attempts made, under the semblance of such legitimate transactions, to convey securities or other preferences to previous creditors, come within the act.

One of the most simple illustrations of *mala fides*, in this respect, is in the case of *Eccles v. Merchiston's Creditors*, 4th Feb. 1729, M. 1128. The narrative of an assignation bore for money instantly advanced. It turned out to be in security of a prior debt. *Dawson v. Lauder*, 4th Feb. 1840, 2 D. 525, is also an instance. Here what was in reality a delivery of goods by the debtor, was made to assume the aspect of a sale by a third party. See also *Scougall v. White*, 7th Feb. 1828, 6 S. 494, where agents having sold goods of their principal, for their own behoof, transferred to him other goods to replace them, writing to him an account of the circumstance, and saying, "they had attended to his interest." This transaction was reduced.

(263.) If, with the design of enabling a creditor to plead compensation, the debtor transact a sale with him, leaving the price to stand against the debt, the transaction will be reduced.

It is necessary to qualify the proposition with the word design. It does not appear that any sale made by a debtor to his creditor, within the sixty days, is struck at, unless there be a *design* to create compensation. Where there are debtor and creditor accounts between the parties, the transactions coming within the sixty days cannot be struck at, unless collusion be proved. There is here an analogy with the law which protects transac-

tions *bond fide* carried on in accounts between bankers and their customers, insurance offices and their agencies, &c. (See 212.) The practice with regard to these is, that the question, whether the advances or indorsements were made for the purpose of creating a preference, goes to a jury; and the same practice would, probably, now be adopted where compensation is created by a sale. Professor Bell says, "A cattle-dealer is due money; and, instead of delivering cattle to his creditor, he sells them to him at the usual credit; and, when his bankruptcy takes place, the creditor pleads compensation. It would seem that this transaction is challengeable under the statute." (2 B. C. 214.) Yet he cites a case, *Hepburn v. Bell*, 11th July 1816, in which he admits that "it was held otherwise." It was here pleaded, in opposition to inquiry into the circumstances, that the statute affords a *presumptio juris*, and stands in the way of evidence in such cases; but the court overruled this plea, and instituted an inquiry. It seems that nothing satisfactory was adduced,—nothing to show whether the transaction was fair or unfair; and, thus thrown on the law of the case, the court found that the act did not carry a presumption against transactions *ex facie* honest.

In such a case, if the example set in the cases of accounting with bankers is to be followed, the reference to a jury, where the fact of the transaction coming within the ordinary course of business is disputed, would settle all difficulties. There is a late case, (*Bruce v. Hamilton*, 27th Jan. 1832, 10 S. 250,) where the question, whether there was an intention to give a preference, could not be inquired into, because there was no act of intention at all on the part of the debtor; the purchases were, in this case, made by the creditor at a public auction. In the case of *Stewart v. Scott*, 4th Dec. 1832, 11 S. 171, a sale to a creditor was reduced; but the decree in the Inner House was in absence. In this case, the circumstance that the debt to be met was a bill past due and protested, might have been held as establishing *mala fides*. See further on this subject *Marshall's Trustee v. Provan*, 21st Jan. 1794, M. 1144; and see above, p. 21.

(264.) When the managing partner of a company is indebted to it, money paid by him, from his own funds, for behoof of the company, may, in case of his bankruptcy within the sixty days, be stated in compensation against his debt to the company.

Borthwick v. Wright & others, 6th Feb. 1827, 5 S. 293. The managing partner had retired bills for which the company were liable. The sum was placed to his credit with the company. The same would doubtless be found where an agent is due money to his employer, and pays money on his behoof. A transfer of goods, however, by an agent, to meet a debt, comes under the act. See the case of *Scougall v. White*, mentioned, p. 219.

(265.) In connexion with an immediate sale, if the price be paid and accepted in indorsed bills, or in drafts, in place of cash, the transaction will not be struck at.

The term "in connexion with an immediate sale" is here used, because it seems never to have been doubted, that when a sale is agreed on for an indorsement, and the indorsement is made, the transaction is good. The turning point of the doctrine is, where the goods have been delivered under a condition for ready money, or without any special condition at all, and a bill is afterwards indorsed to the seller. How far such a substitution will be a preference must depend on the circumstances. When some time has elapsed, and the seller assumes the position of a creditor whose debt is past due, the indorsement may be reducible, see p. 210; but if the selling and the indorsing be virtually contemporaneous acts, it will not be so. In the case of *Watson v. Young*, 1st March 1826, 4 S. 507, the agreement was, that the settlement should be by cash, and that delivery was not to be made till the price should be paid; but those conditions were departed from. During the course of delivery, and before it was completed, the indorsement impugned was made. The bargain being completed, and the goods in the course of delivery, the seller was in the position of being a creditor of the buyer, and the indorsement was, in strict terms, a security to a previous creditor. Virtually, however, it was offered and taken as cash, in immediate connexion with the sale, and was so held to be unassailable. See *Thomson's Trustee*, 28th Feb. 1806, M. *Bankrupt*, App. No. 25.

(266.) *Accretion*.—The performance of an act on the part of a debtor, which, by completing his own title, completes an inchoate security or conveyance in favour of a creditor or disponent, is not struck at; as when a person uninfert grants a precept of sasine on which infertment follows, his own infertment, which is necessary to validate that of the disponent, is not struck at, though coming within the sixty days.

Creditors of Gratney, competing, Feb. 1728, M. 1127; *Watson's Creditors v. Cramond*, 31st July, 1724, M. 1180; *MacLagan's Trustees v. MacLagan*, 21st May, 1800, M. *Bankrupt*, App. No. 11. In this case an obligation had been taken to make up titles, and it was observed on the bench, that "Robert MacLagan might have been compelled to make up his titles, and therefore his doing so cannot be considered voluntary." The principle, however, seems to be, that the completion of his own right on the part of the debtor, though it may have the effect of completing rights flowing from him, not being an act done directly in favour of a creditor, is not struck at. See *Mitchell v. Finlay*, 12th Nov. 1799, M. *Bankrupt*, App. No. 10. The rule

will apply to an heir in apparenecy granting a precept, and getting himself served within the sixty days.

(267.) *Transactions with Third Parties resulting in Preferences.*—A transaction by which, in virtue of an agreement between the debtor and an intervening party, the latter gives a security for the debt, on condition of obtaining an equivalent from the debtor, is struck at.

Miller v. Low, 11th Dec. 1822, 2 S. 77; and Miller v. Duncan & Low, 8th Dec. 1825, 4 S. 283. The difficulty in such a case is, to get the string of transactions brought under adjudication as one arrangement. The solution will perhaps be found in sending an issue as to the intentions of the parties to a jury, in pursuance of the principle laid down in the House of Lords in the case of Blincow's Trustees, (p. 214.) In the case immediately under consideration, a son accepted to his father, on condition of receiving an heritable security, a bill which the latter indorsed to a creditor. By the first action the indorsation was reduced, and by a subsequent action the security was reduced. Lord Mackenzie, whose finding was altered, being against the reduction of the deed, observed in a note, that "the question how far the whole transaction, taken together, might have been reducible under that statute, [1696,] as constituting, within the sixty days, a new ground of preference to the bank, in an action in which all parties were called together . . . was not *hujus loci*;" but Lord Eldin, whose decree was sanctioned by the Court when the case was reported, simply found, on the face of the circumstances, "that the bond and disposition in security was granted in pursuance of a collusive plan . . . intended for the purpose of giving a partial preference," and so it was reduced.

(268.) A preference granted by a person who purchases property from a debtor, within sixty days of the seller's bankruptcy, as a consideration for such property, in favour of a creditor of the seller, if it be of such a character that if it had been granted by the seller himself it would have been reduced, is struck at.

Barbour v. Johnstone, 30th May 1823, 2 S. 351. Here a debtor, in prison, sold property, and the purchaser granted to the incarcerating creditor a bill for the price, which he retired. The action brought was a reduction of the bill, and a repetition of the amount. There was very clear collusion in this case. The report is brief; and it would naturally be inferred that the *ratio decidendi* was the attempt to defeat the act by the interposition of a third person. According to the principle of the decision, however, as explained in the later case of Ramsay v. Scales & Kirkwood, 11th June 1829, 7 S. 749, it would appear to have

been held that the bill was, "in substance, an assignation by the bankrupt of the price of his lands, in payment of a prior debt, in order to give an undue preference." This view leaves the question open whether, if the purchaser had handed the cash over to the creditor, the transaction would have been affected? In the case of Ramsay, where, however, there were not like collusive circumstances, a clear distinction was drawn between cash payments and the granting of bills by such a purchaser. The acts of the purchaser were viewed as if they had been the acts of the seller. He paid, on an understanding stipulated at the commencement of the transaction, one portion of the purchase money to the creditors in cash; this was sustained. To another creditor, whose debt was not at the time due, he granted a bill, and this bill was reduced as being a preference under the act.

(269.) That it may have the effect of creating a new security in favour of a previous creditor, will not affect a security, if, as between the original parties to it, it be a *bonâ fide* transaction, in which value is given by each party. Thus, if a cautioner be demanded, and, as a consideration for being cautioner, an individual requires a security from the debtor, such a security will not be struck at, though it has the effect of giving the original creditor the security of the cautionary obligation.

Monteith's trustees v. Douglas, 12th Dec. 1794, Bell's Folio Cases, 127, where diligence was superseded on the debtor finding caution. It seemed to be considered, that the fairness of the transaction ought to influence the decision in this case; but it is not now likely that any inquiry into the understanding of such parties would be made. It being law that, in any circumstances, an obligation for the relief of a cautioner does not come under the act, the opening up of the question whether the cautioner knew that the party for whom he is becoming security is likely soon to become bankrupt, would lead to much confusion. If direct fraud, however, were alleged in such a case—if it were maintained that the debtor and creditor had laid their heads together to defeat the act, and that, finding that it would be unsafe to make over a security directly to the creditor, they fell upon the plan of engaging an interposed person to act the part of cautioner—the question would certainly go to a jury. This, however, would not be an inquiry into the question of law, whether a cautioner is safe if he be the means of giving a creditor additional security within the sixty days, but would involve a question of fact, viz. whether the person professing to be a cautioner does really act in that capacity. In the case just quoted, it was observed from the bench, "Banks and bankers were not in use to take heritable securities for cash accounts: when they did so, many questions occurred; and we were told

that when the sum was advanced after the date of the infestment, the security fell under the act. But it happens every day, that though the bank will not take this heritable security, the person receiving the credit obtains cautioners, who bind with him, upon his giving them an heritable security in relief. It happens that these cautioners die out, or declare off; and the new cautioners say, we must have a new heritable security, and it is given them. It is the same case with the vendition of the ship offered to Sir William Forbes & Co. They rejected the offer, and demanded cautioners. Accordingly, Mr Campbell became cautioner to them; and, without inquiring into the nature of the security in relief which Mr Campbell was to receive, Sir William received him. The same thing happens every day: new cautioners come into cash accounts, and new securities are given to them. It will be a very strange doctrine to maintain, that in case the principal, for whom the cautioner becomes bound, shall happen to become bankrupt within sixty days, the security in relief, on which the cautioner has engaged, is good for nothing; the situation of such a cautioner would be extremely hard; and if this be law, it is a law which never was discovered before, nor suspected to exist." The observation as to the vendition of a ship, bears reference to the case of *Swinton's Trustees v. Sir William Forbes & Co.* 19th Jan. 1790, M. 1181. Here a debtor, threatened with diligence, and from whom security was demanded, was relieved, on granting his bill, indorsed by a cautioner. The indorser took, at the same time, from the debtor, a vendition of a ship. It was offered to be proved, in this case, that the vendition had been offered to, and refused by, the original creditors, and that they were (at least through their agent) in the knowledge of the transaction with the cautioner. This case approaches, certainly, very close to a collusion to defeat the act. A, who is B's creditor, declines accepting a security, because B may become bankrupt within sixty days, and bring it down; but it is arranged that C shall take the security, and then become cautioner in B's favour, to the extent it will cover. A proof, however, seems not to have been entered on; and, though the Lord Ordinary sustained the reasons of reduction, the court reversed. "It seemed," says the reporter, Craigie, "to be the opinion of the court, that if there had been any concert between the parties for the purpose of giving a preference to Sir William Forbes & Co., in consequence of the vendition granted to the person, who had interposed as cautioner, the judgment of the Lord Ordinary might have been sustained; but no agreement of this kind appeared; and although Sir William Forbes & Co., and their agent, might have been informed of the bargain between the cautioner and the bankrupt, this did not derogate from the validity of the agreement between Sir William Forbes & Co. and the bankrupt." A case was adduced in the pleadings, *Blaikie v. Robertson*, 9th March 1791, M. 887, in which there was clear collusion: the debtor borrowed

money on an heritable security, and paid off a creditor with it ; the money had been, in reality, advanced by the creditor ; so that, for a creditor without a security, the debtor simply substituted one with a security. But see, in relation to this branch of the subject, the case of *Miller v. Low*, 11th Dec. 1822, and 8th Dec. 1825, referred to, p. 222.

(270.) A transaction in which the granting of a security to a cautioner is part of a plan for defeating the act, by making the cautioner the mere instrument through whom that which is virtually a security to a prior creditor, is made to assume the aspect of a *novum debitum*, is struck at.

See the commentary on par. 269, with the considerations as to the means by which the collusion is to be made out.

(271.) The extinction of a principal obligation, to which a cautionary obligation is attached, if made in contemplation of bankruptcy, and for the purpose of relieving the cautioner, is struck at so far as to give the creditors recourse against the cautioner, while, as an extinction of the original obligation, it may stand good.

Mitchell v. Rodger, &c. 26th June 1834, 12 S. 802. Here there were two cautioners on a cash credit. One of these negotiated a transaction by which the debtor sold heritable property, and with the price paid up the debt on his cash credit. This occurred within sixty days of bankruptcy. It was admitted that the cautioner knew the object of the sale, that he found the purchaser, and that he received the money, and, by direction of the principal debtor, paid it into the bank. It was observed by Lord Gillies, that since the animus of the debtor was the sole object of inquiry under the act, and the conduct of the creditor did not weigh, if we put out of view the circumstance that the business was transacted by the contingent creditor, there was nothing in the sale of the property, and the paying up of the credit, with the consequent relief of the cautioner, to bring the transaction within the act. The view taken by Lord M'Kenzie was, however, that which evolves the principle of the decision,—that “the whole circumstances should be regarded as parts of one deed or transaction, the practical object and effect of which was to confer a security and preference upon the cautioners.” The case of *Speir v. Dunlop*, noticed at length elsewhere, (p. 215.) was held the rule as to the method in which the case was disposed of, and if the admissions had been insufficient, an issue must have gone to a jury to find whether there had been an intention to give a preference. The admissions on the record were, however, found sufficient to bring out the intention.

(272.) *Trust Deed*.—That it is intended for the benefit of all the creditors, is no defence against a reduction of an alienation under the act; and thus, trust-deeds for behoof of creditors are reducible.

Peters v. Speirs, App. 18th Dec. 1767, M. *Bankrupt*, App. 1. *Johnson v. Fairholm's Trustees*, 18th Dec. 1770, ib. 5. *Douglas, &c. v. Craig*, 15th June 1832, 10 S. 647. In this last case, however, there were several questions mixed up with that under consideration. It seems to have been questioned whether the person who granted the trust-deed—a partner—was entitled to do so. It does not appear whether there was really notour bankruptcy in Scotland, and Lord Gillies said, “when a man is made bankrupt in London he is bankrupt here.” Lord Balgray observed, “even where a person has the fairest prospect of ultimately being able to pay all his debts, and executes a trust-conveyance for the general behoof of his creditors, yet, if bankruptcy follow within sixty days, the deed is reducible under the act.” See also *Wright v. Walker*, 7th March 1839, 1 D. 641.

(273.) *Creditor Abroad*.—A creditor who is beyond the jurisdiction of the courts of law of Scotland is liable to the effects of a reduction under the act; and any preference transmitted to such a person within the sixty days will be reducible, in the same manner as it would be against a creditor residing in Scotland.

This was so decided in *White v. Briggs*, 8th June 1843, 5 D. 1148,—a case advised by the whole court. The creditors were merchants in London. They had sent a bill to the debtors, their correspondents in Glasgow, with instructions to get it discounted and to remit the proceeds. The debtors discounted the bill, but employed the proceeds otherwise; and being urged to replace the amount, they sent, with the reluctant consent of the creditors, a bill accepted by a third party, and a bill of lading for expected goods, with a draft against them. The documents were put into the post office in Glasgow, and this having taken place within the sixty days, questions as to their delivery in England were not considered material. The main question was, whether the act 1696 applied to the transmission of a preference to a person abroad. The practicability of trying the question was established by arrestments against the creditors *jurisdictionis fundandæ causa*. In the previous case of *Dixon, &c. v. Cowan, &c.* 3d Dec. 1828, 7 S. 132, the same question had been started, but it was found unnecessary to decide it. In the case of *White*, the bench divided against the creditor by 9 to 4. This must be considered law in Scotland, applicable to all cases in which, by arrestment or otherwise, the favoured creditor's effects are accessible to the diligence of our courts; but it may be questioned if it will be enforced

in England. It was decided here, in the case of *Hunter & Co. v. Palmer*, 25th Feb. 1825, that in an English bankruptcy no judicial force could be given in this country to an attachment of property going farther back than the judicial sanction of the bankruptcy, which was then a commission. The question at issue in that, and in some other cases which will be found above, p. 98, was, whether the Scottish courts could look beyond the judicial declaration of bankruptcy to the act of bankruptcy, from the time of which, by the doctrine of relation in England, all the operations of the bankrupt are null, unless in those cases where there are statutory exceptions. It was found that our courts could look no farther back than the judicial sanction of the bankruptcy. There is this difference between an act of bankruptcy in England and the point of sixty days before notour bankruptcy in Scotland, that, in the former case, a circumstance has occurred marking the commencement of bankruptcy, but, in the latter, there is no event drawing such a line between solvency and bankruptcy, and the event which affects the validity of the transaction is one of future occurrence, viz., the process creating notour bankruptcy. On the merits of the question as it stood before the decision was pronounced, and as it would probably stand in England, the following remarks by Lord Fullerton seem applicable :—

“The defenders are English parties, who seek nothing from the law of Scotland. They stand entirely on the defensive. The transaction by which certain effects belonging to the bankrupts were put into their hands within sixty days before bankruptcy, took complete effect ; and must have been beyond the reach of any challenge whatever in the courts of this country, but for the accidental circumstance of debts being due in Scotland to these defenders, which enabled the pursuer, by means of an arrestment, to raise a constructive jurisdiction in this court against them. In these circumstances, I think the question resolves into one of international law, and must be regulated by those general principles which would have guided the English Courts, had the attempt been made by the pursuer to seek the contemplated remedy in that country.”

His Lordship observed, on the circumstance that, at the time of the deed, nothing had taken place to render it invalid :

“The grant is good at this date, and may continue good. It is annulled only on the event which may or may not take place, namely, the bankruptcy of the granter. It is a clause, then, which operates not through the medium of the disability or divestiture of the granter, but directly and immediately, without the interposition of any such disability, against the party receiver of the deed. The true and only legal effect of the enactment is, that every person who shall take from another, a grant or conveyance in security or satisfaction of a prior debt, shall be bound, when that other party becomes bankrupt, if within sixty days, to restore the right so conveyed, at the instance of his prior creditors. In this particular, the statute

does not effect an inherent nullity in the original grant. It creates a supervening nullity attaching to a grant originally free from challenge. Now, it rather appears to me that a provision of this kind, creating a nullity, by the mere force of the statute, in a right originally good, is one which is not entitled to effect beyond the territory of the legislature imposing it. It is truly directed, not against the granter of the deed, but solely against the receiver. It does not, and cannot, create on the part of the granter, any disability to convey, because its agency does not commence till after the conveyance is complete. It imposes purely and exclusively an obligation on the receiver to restore; an obligation which, although perfectly effectual against those subject to the statute, is not entitled to any effect against rights vested in parties who are beyond its reach, both at the time when they received the grant, and at the time when it is sought to be annulled."

On the limitation of the act to the services to which previous decisions had applied it, as an internal regulation, Lord Moncrieff said:—

"The bills are in the possession of the London house, and all the funds and property which they transferred are equally in England, some time before the act of sequestration. The question is, How does that act of sequestration, taking place in Scotland, affect them, not English creditors, (for there is a fallacy in the term,) but English traders, who might have been creditors, but who, having got funds in England which satisfy the debt, have no claim to make as creditors in this sequestration? How could the trustee reclaim such funds by a suit in a court in England? I think it would be a hard matter. The trustee would make his claim on the Scotch Act 1696. Confessedly that has no operation beyond the territory. It raises a presumption of fraud, which, however reasonable as a municipal regulation, rests on no general principle which the courts of other countries must necessarily recognize; and the process of reduction necessary for making it effectual, is altogether unknown to them. Then why must the courts of England recognize it, if the trustee were making his claim there? I own I see very great difficulty in it. To say that they must do so, is to assume that the municipal rule of the law of Scotland is to be taken as a general principle of international law, which the courts of all countries ought to recognize in regard to the estates of all bankrupts domiciled and sequestrated in Scotland, wherever their funds, not at their bankruptcy, but at any arbitrary time before bankruptcy, adopted by Scottish statutes, may be situated."

(274.) *Intention of Parties.*—The material subject of inquiry being, whether or not the transference, security, &c., was made for the purpose of constituting a preference,—it is not relevant to inquire whether the receiver

was acquainted with the state of the debtor's affairs, or had any reason to anticipate his early bankruptcy.

Lord Ordinary's (Newton) note in *Blinco's Trustee v. Allan & Co.* 7 S. 126. "It is not necessary, to the operation of the act 1696, that the creditor shall be proved to have been in the knowledge of the impending bankruptcy, or guilty of fraud in accepting of the security. It is enough if the debtor intends to favour him, and to give him a preference over his other creditors." This doctrine was approved of by the Lord Chancellor in the appeal, (see p. 215,) who deduced from it the legitimate conclusion, that as it was unnecessary to prove consciousness on the part of the creditor, it was irrelevant to inquire whether he was conscious or not.

The same doctrine will of course rule in all other cases coming under the act, and the subject of inquiry will be, not the view with which the security or alienation is received, but the intention with which it is given. Cases may easily be supposed, however, in which the conduct of the creditor will be evidence of the intention of the debtor, and will throw light on the general character of the transaction. In such a form, however, the conduct of the creditor can only come, with other evidence, before a jury.

In one case an attempt was made to apply the act where there was no intention on the part of the debtor to make a preference, and where, in reality, the appropriation of a bill to their own use was an act of self-preservation on the part of the creditors. The debtor, who was considerably in arrear with brokers who discounted long bills for him, remitted to them a bank bill, with instructions to apply it in retiring a bill in favour of a third party. Instead of doing so, they applied it to the reduction of their own balance against the debtors, and the transaction was found not to come within the act. *Dixon, &c. v. Cowan*, 3d Dec. 1828, 7 S. 132. In *Bruce v. Hamilton*, 27th Jan. 1832, 10 S. 250, where there was a sale to the creditor, on which he raised a claim of compensation, the reason why there was no inquiry into the nature of the transaction seems to have been, because it was *ex facie* one in which the debtor did not act at all—it was a sale by auction, and the creditor appeared and bade with the public at large.

(275.) On the other hand, it will not make an intentional preference, by the debtor, valid, that the original debt, which it was intended to meet, was constituted without the creditor's consent or knowledge; and thus it would appear that, wherever a debt has been incurred by fraudulent appropriation, an attempt to make restitution within the sixty days is struck at by the act.

Scougall v. White, 7th Feb. 1828, 6 S. 494. Here, agents sold

certain casks of tallow, belonging to their principal, and appropriated the price. They wished to replace this with other tallow, but failed in obtaining it. They described to him their position, saying, they had "attended to his interest;" and, on the same day, they granted an order of transference, in his favour, of wheat, in a bonded warehouse, delivering to him the merchants' keys, &c.; the transaction was reduced. See *White v. Briggs*, 8th June 1843, as above, where the debt was created by the fraudulent act of the debtor, and the security sent as a preference was unwillingly received. See, however, the case of *Borthwick*, p. 220; and see on property held by a fraudulent title, B. IV. Ch. III. § 2.

Corresponding feature of the Law of England.

Reference has already been made, in general terms, to the difference between what constitutes notour bankruptcy in Scotland, and an act of bankruptcy in England, (p. 196.) The English law, like our own, contains provisions for protecting the estate from fraudulent alienations, but of a character generically different from those exercised under the act 1696. As already stated, the policy of the later legislation on the subject, has been to extend protection to all descriptions of *bonâ fide* transactions anterior to the fiat. By 6 Geo. IV. c. 16, § 82, "All payments really and *bonâ fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission [fiat] against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." By 2 & 3 Vict. c. 11, § 12, "All conveyances by any bankrupt, *bonâ fide* made and executed before the date and issuing of the fiat against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by him committed." And by 2 & 3 Vict. c. 29, "All contracts, dealings, and transactions, by and with any bankrupt, really and *bonâ fide* made and entered into, before the issuing of the fiat against him, . . . shall be deemed to be valid, notwithstanding any prior act of bankruptcy." It is a condition of the protection of all such dealings that, at the time of the transaction, the party had not "notice of any act of bankruptcy by such bankrupt committed;" but it will not affect the transaction that the bankrupt was known to be in embarrassed circumstances.—*Tucker, &c. v. Barrow*, 11th Jan. 1827, 1 Moo. & Mal. 137. Until the passing of these last cited statutes, the conveyances and transactions of the bankrupt were protected only if granted more than two calendar months before the issuing of the fiat. Fraudulent preferences, in England, carry with them a much more serious result than in Scotland; and have, therefore, been a subject of more anxious investigation and distinct settlement in the courts of law. By the law anterior to 1826,

one of the methods by which a trader might commit an act of bankruptcy was, by making "any fraudulent grant or conveyance of his lands and tenements, goods or chattels, to the intent or whereby" his "creditors shall or may be defeated, or delayed, for the recovery of their just and true debts," (1 Jac. I. c. 15.) But "a fraudulent grant, to come within the meaning of this statute, must be by deed, and executed in England; therefore, a fraudulent sale of goods, not by deed, is no act of bankruptcy in itself; but, being a scheme concerted on the eve of a bankruptcy, to cheat innocent persons, in order to secure particular creditors, is such a fraud as shall render the sale void." Cooke's B. L. 102. By the statute 6 Geo. IV. c. 16, § 3, alienations of this latter class were converted into acts of bankruptcy; and thus the sort of act, in favour of a previous creditor, which, in Scotland, will be liable to reduction if notour bankruptcy take place within sixty days thereafter, may, in England, of itself create a state of bankruptcy. If, however, the influence of an undue preference in England is more important than it is in Scotland, the class of such acts is there narrower. To bring a preference within the operation of the bankrupt law in England, it must not only have been in contemplation of bankruptcy, and for the purpose of affording the receiver an advantage over the other creditors, but it must be a voluntary act on the part of the debtor. If it be granted under pressure, *i. e.* under the threat of civil or criminal process, it is valid. (Cooke's B. L. 368—379. Henley's B. L. 25—35. Smith's Mercantile Law, 535—538.) The questions, whether the transference was made in contemplation of bankruptcy, and whether it was voluntary, are questions of fact, which go on issues to a jury. *Gibbins v. Phillips*, 7 Barn. & Cres. 529. It would appear that any kind of threat, or urgency, which may have of itself constituted a motive, making it clear that the bankrupt did not voluntarily prefer the creditor, will save the act. *De Tastet v. Carroll*, 1 Stark, N. P. R. 88. *Morgan & Others v. Brundrett*, 2 Nev. & Man. 280. *Hartshorn, &c. v. Slodden*, 2 Bos. & Pull. 582. In this last case Lord Alvanley said, "If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may be in the contemplation of the bankrupt," the act is good. *Thompson & Others v. Freeman*, 1 T. R. 155. In one case, a conveyance in part extinction of a debt, due by a father to a son, was supported, because, alarmed at the extent to which his parent's estate was becoming dilapidated, the son was urgent to be put in possession of the property. *Belcher v. Jones*, 1837, 2 M. & W. 258. This is a principle very different from any which will be found ruling in the law of Scotland; and how completely our law rejected, from an early period, the principle that legal coercion, or any other emergency, justified a preference, is illustrated in the case of *Johnston's Creditors v. Nisbet & Innes*, 9th Nov. 1750, M. 1190. There is another distinction, too, of considerable consequence. In England, a payment of money, though it be not one of the acts constituting an

act of bankruptcy, yet, if it be made, (whether before or after the act of bankruptcy,) in contemplation of bankruptcy, and for the purpose of bestowing a fraudulent preference, through a payment in current coin, is struck at. *Poland v. Glyn*, 2 Dow & Ry. 310. *Flook v. Jones*, 4 Bingh. 20. In the latter case, "The Lord Chief Justice told the jury, that, if they believed that Dring, [the bankrupt,] at the time of the payment in question, knew he could not go on,—knew that there was a probability of his becoming a bankrupt, and had preferred a particular creditor in contemplation of bankruptcy, the plaintiffs would be entitled to a verdict."

It has to be remarked, that while, in Scotland, all rules in relation to notour bankruptcy relate to all classes of persons, the above statutory regulations, in England, are from the acts which fill the place of our sequestration act, and apply solely to the commercial persons coming under their operation. In Lord Campbell's Insolvent Debtors' Act (1 & 2 Vict. c. 110) there are distinct clauses applicable to the persons coming under its operation. The prohibition against the debtor by § 59, is, that he shall not, "being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor," &c. All such acts are void, if done within three months of the commencement of imprisonment, or with the view and intention of applying for the benefit of the act. The circumstance that it is voluntary, as above, is necessary to bring a transaction within the act. See Cooke's Insolvent Debtors' Practice, 102—112.

SECT. 2.

FIXED CRITERIONS OF THE DATE OF ALIENATIONS.

(276.) *Infestment*.—In the case of dispositions, heritable bonds, and other rights "whereupon infestment may follow," the date of the deed is taken to be the date of the recording of the sasine.

By the act 1696, it was the date of the taking of the sasine. By the sequestration acts, 54 Geo. III. c. 137, § 12, 2 & 3 Vict. c. 41, § 25, it was made the date of registration.

(277.) In the case of a person who is not infest conveying his personal right, it has been decided that the date from which the sixty days run, is that of the conveyance, and not of the infestment or its registration.

On the ground that, on strict feudal principles, such a right is not one "whereupon infeftment may follow," but is merely a transference of a right on which infeftment may follow. *Scot's creditors v. Charteris*, Jan. 1734, M. 1239; *Stark's trustees v. M'Lean*, 13th June 1805, 2 B. C. 230; *Wrights v. Findlater*, 19th Jan. 1809, F. C., M. Syn. 56. See the history of the law in reference to this doctrine, 2 B. C. 229, 230. It follows that, in the conveyance of a personal right, whatever time may elapse before infeftment, its validity will depend on its being itself clear of the sixty days. It may be questioned if the act was intended to be so narrowed in its operation.

(278.) *Where Sasine unnecessary*.—In the case where sasine is not necessary for the completion of a real security, as in that of a conveyance from a vassal to his superior by resignation *ad remanentiam*, it seems to be law that the date of the registration of the title of the instrument of resignation, is the point from which the sixty days will have to be counted.

Dickson, &c. v. Mitchell, 7th Nov. 1749, M. 1241; see 2 B. C. 229. Before the passing of the 54th Geo. III. it was decided, in the above case, that the date of the instrument, not that of its registration, was the point whence the calculation should begin. This decision had the same accordance with the old principle that, in the case of infeftment, the date of its being taken, and not that of its being recorded, should be the rule, as the principle above laid down has with the statutory alteration.

(279.) If the deed itself do not come within the act from its own nature, the date of the recording of the sasine will not bring it within the act. If, then, a disposition or a bond be the consideration for a new debt, and not a preference for a previous one, a delay in the taking and recording of the sasine bringing this act within the sixty days, will not make it reducible.

Johnston v. Home, 29th Jan. 1751, M. 1130; *Elliot v. —*, 7th March 1768, *Monboddo*, 5 B. S. 937; *Mitchell v. Finlay*, 12th Nov. 1799, M. App. Bankrupt, No. 10; *Cormack v. Anderson*, 8th July 1829, 7 S. 868; *Cranstoun v. Bontine*, 2d Feb. 1830, 8 S. 425; see this subject discussed elsewhere, (Sect. 3.) The chief difficulty was felt in the application of the rule to those cases where, though the making out of the security was delayed, the delay not being *in gremio* of the transaction, but incidental to it, was found not to take the transaction out of the character of a security for a *novum debitum*. In a late case, as will be seen in the passage referred to, a disposition was shown to draw a distinction between those cases where the granting of the deed

came within the sixty days, and those where the registration of the sasine only came within that period.

(280.) *Intimation and Delivery.*—Dispositions, assignments, and venditions, which do not require sasine, but to which intimation or delivery are requisite, in order to render them complete as transferences or as securities, “are, for the purposes of the act, to be reckoned to be of the date of the intimation, delivery, or other act requisite for completing the same.”

54 Geo. III. c. 137, § 13; 2 & 3 Vict. c. 41, § 25. As to delivery in sales of moveables, see above, p. 164. Here the same principle seems to hold, which applies to the case of a sasine, viz. that when the transaction, by its own nature, does not involve the principle of a preference from the beginning, its completion by intimation or delivery will not bring it within the act. See *Gibson v. Forbes*, 9th July 1833, 11 S. 916, cited at length elsewhere, (p. 252.) It has been held that “the legal form of intimation is not necessary to complete an assignation whereby one of two partners assigns his share of the company stock to the other;” *Russell v. Breadalbane*, 3d July 1827, 5 S. 891, affirmed 4th April 1831, 1 W. S. 620.

(281.) *Assignment of Lease.*—An assignment of a lease, where the tenant has the right to assign, completed by actual possession, does not require, in questions with creditors, intimation to the landlord, and the date of the actual possession will mark the completion of the transaction.

3 E. 5. 5. A distinction is here made between the landlord's right to intimation, and intimation as it may be necessary in questions with third parties. When it was questioned whether assignments contravening the terms of the lease were null, or were only subject to personal objection by the landlord, the distinction was not so clear as it has become since it became settled law that the right of objection is a personal privilege to the landlord, and does not affect the validity of the assignation. (Compare 1 B. C. 77, with *Hunter on Landlord and Tenant*, 200.) There is no analogy between a landlord receiving intimation of the assignation of a lease and a debtor receiving intimation of the assignation of a debt. The debtor is formally warned of the change, that he may know to whom to pay, and that he may obey the first intimation to him, that he is not to pay his original creditor, but another person. A landlord is not a payer, but a receiver. He holds the old tenant bound till he has accepted of a new one; but that is a matter which cannot affect third parties. The distinction is brought out in this circumstance, that in the case of an assignation of a debt, private knowledge

on the part of the debtor is no equivalent to formal notice. *Dickson v. Trotter*, 18th Jan. 1776, M. 873; *Rollo v. Laird of Nidrie*, 4th Feb. 1665, 1 B. S. 510. It was observed by Lord Craigie, in the case of *Brock*, 8 S. 655, "It is no doubt necessary, to create a direct obligation upon the landlord, that he should be informed of the assignment; but for this no particular form is necessary. If, *de facto*, he knows that such a right has been granted, which he may do in many ways as well as by direct communication, the transfer is as effectual, both for and against him, as if it had been intimated to him by a notary, or in the form of an executed summons. This, as it humbly appears to me, is a case quite independent of the late statute 54 Geo. III. c. 197, [137] § 13, which relates only to intimations indispensably necessary in point of form to complete the intimated right."

It would appear, in conformity with this principle, that where a profitable lease is sublet at a rack-rent, an assignation of the intermediate lessee's interest in it requires intimation (in questions with creditors) to the subtenants only, who are, in this case, the debtors.—*Sime's trustee*, petitioner, 23d May 1806, M. App. Tack, No. 13, in which the original lessee sublet his tack on condition that the subtenant should pay the original rent to the original landlord, and a surplus rent to the sublessor. This surplus rent the intermediate tenant assigned, and the assignee received it from the subtenant, who continued to pay the original rent to the original landlord. It was observed on the bench, "There have been many questions as to the mode of completing an assignation to a lease. But there can be none more effectual than possession. . . . Here there is all the possession that the case admits of—the possession of the subrents, which implies intimation to the subtenants."

It is quite in consistence with the principles brought out in these cases, but, in the absence of a precise decision on the subject, it would be unsafe to state it as law, that an assignation by an intermediate tenant in no case requires intimation to the landlord in questions with creditors, but is completed by intimation to the subtenant alone, provided that intimation be followed by a levying of the rents when they fall due. It is to be observed, that such a case differs from the immediately preceding one, because all that the assignation and the intimation covered was a surplus rent, which the subtenant, who was virtually an assignee to the original lease, agreed to pay to the intermediate tenant as a consideration for being put in his place, while this sublessee, or more properly, assignee of the lease, continued to pay the original rent to the original landlord. In such a case, it might be said that intimation alone would be a sufficient completion, because the assignee is not properly an assignee to the lease, but only to the annual sum stipulated for as above by the cedent. It is not maintained that possession is not necessary, as well as intimation, in such a case, but only that if it be unnecessary, it does not follow that posses-

sion is equally unnecessary, where the transaction is a complete assignation of the lease.

Recurring to the view that, in such a case, intimation to the subtenants, if followed by a levying of the rents, is a sufficient completion of the assignation, without intimation to the landlord, the above considerations open for us a view of the actual nature of intimation in such a case, which is to be considered as a taking possession, and the only means of taking possession which the circumstances admit of. It is in the shape, then, of a taking possession, and not in the ordinary shape of an intimation to a debtor, that we must hold such an intimation to act. Accordingly, it would seem that it is only in the meantime, and until a farther act of *bonâ fide* possession presents itself for the adoption of the assignee in the levying of rents, that this inferior and interim act of possession will be effectual, and that if the assignee do not levy, or attempt to levy, his rents, he will not be exercising possession, and his intimation will go for nothing. In the case of Brock, to be afterwards considered, there is, in the opinion of the majority of the judges, (8 S. 652,) this remark :—" If a principal tenant, wishing to transfer his lease, should intimate an assignation of it to his landlord and to his subtenant, and if the subtenant, after this, should pay rent to the assignee, it is clear that the real right in the assignee would be complete. Further, it may be granted, that if, after due intimation in the manner which has been mentioned, the question should arise before a term's rent became payable, the assignee might still be held to have attained civil possession ; for, by the intimation itself, he had assumed the control of the subtenant's management, put himself *in titulo* to sequester for current rents, and maintain other possessory actions ; and, in short, asserted his possession in every way which the nature of the case admitted." It is here taken for granted that intimation to the landlord is a necessary ingredient of this form of possession ; but this appears to have been admitted by inadvertence, and, accordingly, we find Lord Medwyn following it up :—" I concur in the above opinion, understanding that it does not import that an assignation by a principal tenant, where there is a power to assign, must be intimated both to the landlord and subtenant ; but that such an assignation, if intimated to the subtenant alone, and the assignee levy, or attempt to levy, the subrent, will complete the right of the assignee."

It is necessary, in relation to this subject, and to prevent the doctrine attempted to be laid down from being misunderstood, to make some remarks on the legality of the assignation. The doctrine must be held to apply only to the case where an assignation is a valid one ; and it can only be so if the landlord was not entitled to object, or if, being entitled, he has not objected. In the latter case, it is necessary that the landlord should be *aware* of the assignation. An intimation will, of course, be the most trustworthy means of making him aware ; but, as above shown,

actual knowledge acquired in some other manner will be equivalent. There is here an incidental difference between actual possession, and possession through intimation to subtenants and the levying of rents, because, in the former case, the actual possession by a new tenant must in itself be the most complete and effective virtual notice to the landlord. It may be questioned, however, whether a lease specially excluding assignees, is one of which an assignation can be validated by possession, notice, or any thing else but the concurrence of the landlord.

It may here be remarked, that a false analogy between the completion of the assignation of a lease, and that of an assignation of heritable property by infestment, appears to have in some degree obscured this subject. A lease is simply a personal right, (Hunter on Landlord and Tenant, 278,) although, by the act 1449, as enlarged in its operations by subsequent decisions, it has been invested with the qualities of a right to heritable property, for special purposes. As a personal right it becomes real by possession, in the same manner as a personal right to moveable commodities does; *i. e.* the performance of the act of possession is the act of the assignee, not of the cedent. In the taking of infestment, however, the act of investment is not the disponee's act, but is an act in his favour, emanating from the superior, and performed by persons acting under the superior's mandate. The incompleteness of the title of an assignee, who has not taken possession, is like that of a purchaser of goods who has not removed the goods, or put his own marks on them,—who has neglected to perform that act which publishes his proprietorship to the world. The incompleteness of the title of the holder of an unexecuted precept, is that of the man whom the superior has not yet invested as his vassal, though he has given authority to his bailie to do so.

282. *Intimation to Subtenant.*—An assignation of a lease, where there are subtenants in possession, is not sufficiently intimated for the purposes of the act, if intimated to the lessor, but requires intimation to those in possession as subtenants.

Inglis & Co. v. Paul, 26th Feb. 1829, 7 S. 469. As to how far it requires to be intimated to the lessor at all, see the above commentary. This case had reference to the clause in relation to the sufficiency of intimation at the date of sequestration; but it applies equally to the present question. The assignation was of a building sublease to a lender, who intimated immediately to the principal tacksman, but failed to intimate in sufficient time to the subtenants in possession. It was observed by the majority of the consulted judges:—"Tacks, in one respect, are personal, and, in another, real rights. In a question between the landlord and the tenant, or his assignees, they are personal rights; therefore, in a competition between two *bonâ fide* and onerous assignees, the landlord

is bound to prefer him who first intimates his assignation, (which is the way of completing a personal right,) and to put him in possession accordingly. But in a question with the singular successors of the landlord and the tenant, or his assignee, a tack is a real right, by force of the statute 1449; and, therefore, it is incomplete, unless possession, natural or civil, has been attained.

. It must be admitted, that some inconveniences may arise from this doctrine, where a tenant assigns his lease, meaning to remain in possession himself as subtenant to his assignee. Perhaps it may be removed by the assignee taking and recording an instrument of possession, and then granting a sublease, specifying the time at which possession is redelivered to the subtenant, and his entry takes place. But, at any rate, a general principle of law must not yield to a particular inconvenience, which, if it exist, should be removed by legislative interference." But see, on this subject, what follows.

(283.) *Continuance of Occupancy*.—No assignation of a lease in security, effectual against the rights of creditors, can be created by an arrangement by which there is no apparent change of ownership, the original tenant becoming nominally the subtenant of the assignee, but continuing to occupy the premises, and paying the rent to the landlord; nor will intimation to the landlord validate such a transaction.

Brock v. Cabbell & others, 29th Nov. 1822, and 5th March 1830, 2 S. 52, and 8 S. 647, affirmed 23d Sept. 1831, 5 W. S. 476. But it must be admitted that the above principle is rather a deduction from the united opinion of the majority of the judges, than from the simple terms of the decision as confirmed, for some of the judges were of opinion that there were informalities which rendered it unnecessary to inquire whether the assignation had been properly completed; and the Lord Chancellor, in moving for judgment in the House of Lords, declined entering on the general question of intimation and possession, being satisfied that, under the circumstances, there had not been vested in the assignee a real *bonâ fide* security.

The essential circumstances of the case were these:—Newbigging & Co. held lands on leases for one hundred years, to their heirs, assignees, and subtenants whatsoever, "but for whom always the original tenants shall continue bound." They converted the premises into a bleachfield, erecting houses and machinery, and thus created a virtual estate, on which, as in the case of a feuholding, they tried to raise money by granting a security. On borrowing £12,000 from the Glasgow Bank, they assigned and sold to it, not only the years to run of the tack, but the buildings and machinery connected with the bleaching establishment. The assignation was notarially intimated to the landlord, and acknow-

ledged, and there was no question raised whether, as between him and the assignees, it was a valid transaction. Thereafter, missives were exchanged between the bank and Newbigging & Co., by which the former offered to receive the latter as subtenants for one year, and the latter accepted. The consideration was thus expressed :—" At the subrent of per annum, over and besides the whole rent and others, payable to Mr Johnstone, the landlord, and others, for the same, which, with all taxes, burdens, and duties whatever, affecting the property or possession, you are to fulfil, as well as to uphold and keep the whole buildings, fences, and machinery in good order and repair." The missives were unstamped, and did not specify the subrent. The bank granted a backbond, by which they acknowledged that they held the assignation merely in security, and bound themselves to reconvey on repayment.

In terms of the above condition in the missives, Newbigging & Co. remained in possession, and continued to pay the rents as formerly. The bank never paid any rent to the landlord; nor did Newbigging & Co. pay any rent to the bank, unless the discount on the bills, through the negotiation of which the bank made advances, could be considered as rent. Newbigging & Co. made additions to the machinery and buildings, and insured the works in their own name. Matters continuing in this position for a few years, Newbigging & Co. were sequestrated. On this event, the landlord intimated to the bank that he held them responsible for the current and future rents, in terms of the assignation. The trustee, in the meantime, was preparing to sell the machinery, when he was stopped by interdict; and the question came to be discussed. In this case, as observed in the opinion of the majority of the judges, " The avowed object of the transaction was, to interpose the bank as a principal tenant between the landlord and Newbigging & Co. solely to create a security for an advance of money made by the bank to Newbigging & Co. who were to continue in the natural possession of the subject. Accordingly, it is admitted that the bank never attained natural possession. With regard to civil possession, Newbigging & Co. never paid rent, nor performed any prestation of the tack to the Glasgow bank; nor did the Glasgow bank pay any rent, or perform any prestation to the landlord. There was no opportunity of intimating an assignation to a subtenant, for there was no subtenant distinct from the cedents and the assignees."

This case was in some measure embarrassed by the want of any sum as subrent, and the want of stamp in the missives; but in reality these circumstances did not come to be considered essential to the case, for, as there was no subrent paid or demanded, the missives were not founded on by the bank; and as to Newbigging & Co., they had possession, which would have validated a lease *de anno in annum*, if the bank were entitled to grant them one. These circumstances, however, stood in the way of an exposition of the broader principle, and the ques-

tion would have come purer out if the bank, by a regular stamped document, had sublet the premises to Newbigging and Co. on the simple condition of the latter paying the rent to the original landlord. Although, therefore, the informality was noticed, it appears that the majority of the judges looked upon the question independently of it, and considered that tenants could not, by an assignation, though intimated to their landlord, create a valid security over their lease while they remained in possession in the alleged capacity of subtenants, but continuing to pay rent to their original landlord, and exhibiting to the world no change in the relative position of parties. Even in this view of the matter, however, the decision does not bear out the general principle, that there are no means by which a tenant remaining in possession can grant a security over his lease, good against creditors, although the opinions seem to favour the view that there are no legal means of doing so. The question, however, still remains open, whether, in such circumstances as the above, if the assignees had come in the place of the cedents in their relation to the landlord, paying him the rent, and had granted a formal lease to their cedents as subtenants, and the cedents had paid to their assignees a rent as subtenants, the transaction would have been good?

There is a comparatively old case, *Wallace v. Campbell*, 16th Nov. 1750, M. 2805, which has often been referred to on this subject. A tenant, on condition of his brother advancing money, granted him an assignation of his lease. The brother granted the tenant-cedent a sublease, for a specified rent, along with which the sublessee agreed to relieve the assignee of the original rent, which was but nominal. The validity of the assignment came to be considered in competition with an adjudication, and the court found for the adjudger. There is some notice, in the report, of a remit having been made to the Lord Ordinary to inquire what evidence there was of the assignee having been enrolled in the rental of the landlord, (the Duke of Argyle,) and of his lordship having reported that there was none.

But the principle of the decision was certainly that which Kilkerran intimates in his report, in the words, "The transmission of the property of moveables is completed by delivery, of lands by infeftment, of *nomina* by intimation, of tacks and other rights, which require no infeftment, by possession; and, therefore, between two tacks, or between two assignations to a tack, or between two subtacks, it is the first possession that determines the preference. In no case can a transmission be deemed complete where no act intervenes other than what passes between the granter and receiver, and is known to nobody but themselves, which was the present case. And it was thought no good answer, which for Inveresragan was chiefly insisted on, that as it was the very purpose of the disposition that he was not to have the natural possession, and that, consequently, he was in effect no other than an assignee to the mails and duties, at least during

the currency of the sub tack; so the sub tack being to the granter himself, who was in possession, there was no other to whom intimation could be made; and, therefore, either the transmission ought to be considered as complete, or it must be said, which none would say, that such sort of agreement, however in itself fair and honest, was reprobated in law."

There seems, indeed, to have formerly been a disposition to find something like a substitute for registration in the entry of an assignee in the rental of a great landlord. An inquiry into such a matter was, as already remarked, made in this case, and Lord Craigie, who, in the case of Brock, was in favour of the doctrine that nothing more is necessary to a valid assignation of a lease, than its acceptance by the landlord, says, as to the case of Wallace: "I rather consider the fair inference from that decision to be, that if there had been an intimation, or any thing equivalent to an intimation, to the landlord, the assignation would have been supported;" and then he refers to *Yeoman v. Elliot and Foster*, 2d Feb. 1813, F. C. where tenants of the Duke of Buccleuch assigned leases in security for debts, and obtained sub-tacks without changing possession. The assignations were entered in the duke's rental; and as the decision was in favour of the assignees, there is no doubt that if the case were a precedent, it would make acknowledged notice to the landlord sufficient, without any farther act of possession, and settle this difficult question. The majority of the court, however, following the opinion of Professor Bell, (2 B. C. 67,) in the cases both of Inglis and of Brock, treated this case as no precedent.

SECT. 3.

EFFECT OF THE ACT ON THE COMPLETION OF BEGUN TRANSACTIONS.

The acts against which the statute is levelled, are those which place any one of the creditors in a better position than he was, at the expense of the rest: that is, by making over to him, directly or indirectly, something which would otherwise have been distributed for the general benefit of all. Such a proceeding must not be confounded with the honest bringing to a conclusion of a transaction partly accomplished, though necessarily or accidentally deferred. It must be, however, generally a question of circumstances whether, in the case, for instance, of the granting of a security, it is the consideration for which a debt has been incurred—the direct consideration, on condition of receiving which the creditor consented to become a creditor; or is a separate act in his favour, designed to give him a preference over other creditors; in other words, whether it is a consideration for a *novum debitum*, or a preference to a creditor. Nice distinctions have been taken on this point, and any announcement of a principle of

law must be made with deference. The following is a principle which seems to embrace the ratio of the decisions generally on the subject.

(284.) Where a bargain is made, and a security is promised as an event to take place at some future time, such security, if granted within the sixty days, is struck at; and it is only in the case where there is no postponement of the security *in gremio* of the bargain, but where its completion is postponed from incidental circumstances, that it is supported as a *novum debitum*.

As an illustration of the former class of cases, may be mentioned that of *Brough's Trustees v. Duncan and Jollie*, 5th June 1793, M. 1160. Here, parties had become cautioners in a cash credit, stipulating that they were to have a bond of relief, and they obtained such a bond; but as the infestment on it came within the sixty days, it was reduced. In another case connected with the same transaction, the obligation to grant the security was in these terms:—"And seeing I agreed to give you an heritable security in relief of the said sum, previous to your consenting to join me in said bill, I oblige myself to do so accordingly, over my property in Register Street, and that as soon as the proper writings can be made out." The debtor's fulfilment of this obligation was reduced, *Brough's Trustee v. Spankie & Jollie*, 5th June 1793, M. 1179.

On the other hand, in the case of the *Bank of Scotland v. Stewart & Ross*, 7th Feb. 1811, F. C., where the creditor was an agent advancing money on a real security, and where, as a fact from which it must be presumed that no delay was intended, the titles were put into his hands at the time of the bargain, a delay in making out his title, which brought it within the sixty days, was not fatal to it. This principle was followed in *Cormack v. Anderson*, 8th July 1829, 7 S. 868, where it was pleaded for the defence that the personal security of the debtor had never been trusted to, and that, though the security was delayed, it was understood that there was no finished transaction between the parties till it was completed.

In the late case of *Anderson v. Walker*, (Jury Trial,) 29th March 1842, 4 D. 1180, the Lord Justice Clerk (J. Hope) said,—“Ever since the celebrated case in which Lord President Blair delivered his opinion, [*Bank of Scotland v. Stewart & Ross*, *ut supra*,] it has been held, that if the money was advanced on a stipulation for a certain definite security, that security will be good, though only completed subsequently, and within sixty days of bankruptcy, if the stipulation be proved in any way. Such I hold to be the established law.” In a special verdict in favour of the validity of the transaction, it was found, “That at the time of advancing the sum of £1190, or previously

to such advances, it was expressly stipulated and agreed upon, as a counterpart of the transaction, that the borrower, Andrew Smith, should give an heritable security for whatever sum Walker might obtain or advance as a loan for Smith, to the extent of £1500, over the specific subjects described in the security afterwards granted on the 1st February: That although such stipulation for a specific security was not reduced into any binding agreement, or formal writing, at the date thereof, yet it is evidenced by writings applicable to and prior to the advances, as well as by the facts and circumstances of the transactions between the borrower and the defender." It was found farther, "That the sums would not have been advanced except in respect of that stipulation for a specific security over specified heritable subjects, as the counterpart of the transaction."

There is a comparatively old case, *Houston & Co. v. Stewarts*, 20th Feb. 1772, M. 1170, the decision in which, as it went to support a security granted within the sixty days, in virtue of a previous obligation, has been repudiated. It appears, however, that the circumstances of this case made the nearest possible approach to those of a mere delay in granting a security covenanted for at the moment, and the court seemed to look on it as such a case. The title-deeds of the borrower were placed in the lender's hands till the bond should be made out. The former wrote to the latter, "Gentlemen,—Please to employ any writer you please, and let him draw out a heritable bond of security upon my subject, in any way you or he agrees." This would have shown an unquestionable understanding that, *in gremio* of the bargain, there was to be no postponement of the security, had not such an interpretation been rendered doubtful by the words which followed, "and this shall be your security till that be done." It may be mentioned, that in the early and imperfectly reported case of *Eccles v. Merchiston's creditors*, 4th Feb. 1729, M. 1128, it would seem to have been then the principle, that any kind of delay of a deed, bringing it within the sixty days, was fatal to it; and it is right to state, that the opinion of the Lord Chancellor, in the case of *Mansfield*, noticed below, (p. 247,) appears to favour this view.

There is another early case, *Mansfield, Hunter, & Co. v. Cairns*, 12th Feb. 1771, M. App. *Bankrupt*, No. 6, where the decision was in support of the deed. In this case, the delay seemed to have been entirely created by the searching of the records and other necessary preliminaries. There was no intention to give the lender the security of a mere personal creditor, in the first place, and to superadd an heritable security. The case of *Monteath's Trustees v. Douglas & others*, 12th Dec. 1794, M. 1146, deserves attention. The deed questioned, in this case, was a bond of relief to cautioners in a bond of corroboration, there being an interval of several days between the two. The interval was explained as the time necessary for the transaction of the business, the parties living at a distance from each other, and intending,

from the commencement, that the deeds should form part of one transaction. The court at first reduced, but, on a hearing in presence, and full examination of the circumstances, repelled the reasons of reduction. See farther, as to the difficulty of extracting any fixed principle on this subject, 2 B. C. 226, 227.

It may be generally inferred, from the above commentary, that unless the precise security that is to be given be understood as part of the bargain, the security will be struck at as not *in gremio* of it.

It would seem also to be inferrible, that no previous separate obligation to grant it will legalize a deed which would otherwise come within the act. The existence of an obligation, and the attempt to fulfil it, will indeed afford room for clearly presuming the existence of the precise circumstances to which the act applies,—a creditor, on an imperfect security, and an attempt to enlarge that security to the prejudice of other creditors. The court, however, at one time, adopted a different principle. In *Spottiswoode v. Robertson-Barclay*, 19th Nov. 1783, M. 1177, implement of an obligation in a marriage-contract was held to validate a conveyance. Lord Craigie, in the subsequent case of *Cranstoun v. Bontine*, 2d Feb. 1830, 8 S. 425, remarked, in relation to the above case, “that was a case attended with this peculiarity, that the husband, as administrator for his wife, had wrongfully delayed to give her infertment, and the court were moved by this, especially when his creditors attempted to cut down the wife’s right. Still the court, even in this instance, were much divided.” See note by Lord Hailes, Decisions, 930. In *Mansfield v. Walker’s Trustees*, elsewhere described, it was remarked, in relation to this case, that “there was a reclaiming petition not disposed of,” and it is said that the case was compromised.

(285.) It has been decided, that where there are missives of sale, by which the seller binds himself to make a regular conveyance to the purchaser,—if the price has been advanced, a delay in making out the title of the purchaser, though bringing the infertment within the sixty days, will not affect the transaction.

Cranstoun v. Bontine, 2d Feb. 1830, 8 S. 425, affirmed 6th July 1832, 6 W. S. 79. This was a strong case, with several specialities, which rendered it difficult to evolve the principle. The purchaser was the seller’s son, and the reduction was libelled under the act 1621, as well as 1696; but the former alternative was abandoned. Then it appeared that the money was not specifically paid by the purchaser to the seller. The former was a creditor of the latter, and the purchase was to cancel part of the debt. Had the whole transaction come within the sixty days, it would have been, undoubtedly, reducible, as a preference under the mask of a sale. The transaction, however, on the missives, viewed as an act done when the debtor’s hands were not tied up, was

decided to be a sale of which the price was paid; and it was thus cleared for the consideration of the question, whether delay in the fulfilment of a conveyance which a party had, by missives, come under a legal obligation to grant, was struck at. It was found not to be so, and the decision was confirmed on appeal. It is right, however, to observe, that it has been laid down from the bench, in the case of *Mansfield v. Walker's Trustees*, noticed before, that the record, in this case, was not properly made up for the trial of all the questions connected with it. There is a palpable difference between a delayed conveyance to a purchaser, and a delayed security to a lender. In the former case, the intention, from the beginning, to grant the conveyance cannot be doubted,—it is the only consideration for which the money can be supposed to be advanced. In the other case, however, the risk to be encountered always is, that for a debt incurred on an inferior security, or on no better security than a promise to pay, a stronger security may be substituted, by a partial debtor, at the time when he feels his affairs going into disorder. An interval of time between missives of sale and the conveyance of the property is very common; the price, however, not, in general, being paid till the title is delivered. As Lord Balgray observed, “There must always be some interval, more or less, after a binding agreement for the transfer of heritage is entered into, and [before] the point of time when real delivery is given, pursuant to the agreement.

(286.) There are no means of collecting from the decisions, how far the length of time which intervenes between a bargain, and its completion on the part of the debtor, by giving the other party the means of completing a real right, will affect the question, whether it is a *novum debitum*. The decisions merely afford ground for presuming, in conjunction with the operation of the rule that the date of infeftment is to be held the date of the deed, that the length of the intervening time would be an element of consideration.

See the decisions above cited. It may be said that, when the transference is stipulated for *in gremio* of the bargain, a longer or shorter delay in executing the security cannot make it less or more an essential of the bargain. But it is clear that the permitted suspension of the performance of a contract alters the nature of the bargain itself. If a person has stipulated for a real security, and advances the money, and years pass during which the subject of the security may be conveyed to another party, or affected by the diligence of creditors, while the creditor makes no effort to obtain it, he has, undoubtedly, put himself into the position of a mere personal creditor, with a claim for a real security. In the case of *Cormack v. Anderson*, 28th July 1829, above referred to, p. 242, the heritable bond was executed two months

after the debt arose; but sasine was not taken till five years afterwards, and it was that part of the transaction that brought it within the sixty days. On its merits, the case would have been utterly different if the bond had been delayed for five years, and the infestment on it for two months. Yet, in the eye of that part of the law which makes the date of the infestment the date of the deed, the two transactions would be of the same character. It is by circumstances of this description that the opinions given in *Mansfield v. Walker's Trustees*, and elsewhere criticised, seem to have been influenced, when the new principle of looking, not to the date of the sasine, but to that of the last act done by the debtor, was introduced. There seems to be room here for the beneficial interference of the legislature. The difficulty, in relation to the length of the delay, was seen by Lord Mackenzie, in his observations on the case of *Gibson v. Forbes*, noticed below, when he said, "I do not think there is any thing at all like a uniform train of decisions, carrying the exception so far, as to hold that every obligation is to be viewed as *novum debitum* during an unlimited extent of time, in reference to implement, if it is the voluntary disposition of the debtor after notour bankruptcy, or within the sixty days."

(287.) *Mistake in fulfilment of Bargain*.—The law is not clearly settled in regard to the question whether, if, in the fulfilment of a bargain, any mistake has been committed whereby the one party does not fully convey, and the other does not fully receive, that which both of them understood, at the time, to be conveyed, the debtor can interpose to correct the mistake within the sixty days. In a case where it was decided, that, after sequestration, his hands are tied up, and that independently of any question as to the validity of such a deed on its merits, it becomes then null from the beginning, as springing *a non habente potestatem*, the question, whether the case came within the act 1696, was left unsettled.

Professor Bell says, "It seems to have been held, that wherever the bankrupt interfered only to do that which both parties had understood had been done at first, and upon the face of which understanding alone the money was advanced, the act was not objectionable, nor such as could entitle creditors to separate the security from the advance." 2 B. C. 223. In support of this doctrine a case is quoted, which goes even farther, and would seem to bear out the supposition, that not only may a mistake, in which the parties have not done what they intended to do, be corrected, but that even a security intentionally given in a particular shape, which turns out to be bad, may be rectified. This was the case of *More v. Allan*, 23d Jan. 1800, where the

consigner of a cargo having drawn bills on the consignee, (viz. the indorsee of bills of lading,) indorsed them for value. On the consignee refusing to take the goods and to honour the bills, the cargo went into other hands, and the consigner drew new bills on this consignee, and indorsed them to the indorsee of the old ones. This latter transaction was within the sixty days; yet it was supported. This is evidently going farther than allowing the mere correction of a mistake,—such as an omission in the narrative or dispositive clause of a disposition. In such a case the understanding of the parties is, that the thing is done rightly and formally from the beginning,—they did not intend to omit the words, and trust to the efficacy of the deed without them. In the above case, however, the parties intended to trust to the drawee of the first set of bills accepting them; and, when their trust was not justified, the debtor was allowed to substitute others within the sixty days.

A case, however, occurred, in which the law on this subject, if it could not be said to be settled, was very fully examined. *Mansfield v. Walker's Trustees*, 28th June 1833, 11 S. 813. affirmed on appeal, 1 S. & M'L. 203. James Stuart was proprietor of several parcels of land, amounting in all to ninety-five acres. They went by the general title of Hillside, though that name was properly applicable to only about five acres. The proprietor offered a security over the whole lands, transmitting to the parties a valuation of the whole. The offer was accepted with reference to the valuation. The proprietor, a writer to the signet, sent a note of the description of the property to the agents for the lenders; and this description was so completely limited to Hillside proper, that, to any person acquainted with the premises, it would appear that only that small portion of the land was intended to be covered by the security; in fact, it was a description taken from the titles of Hillside proper. The drafts of the bonds framed on this description were transmitted to the lender, who pronounced them "all right;" and the bonds were executed accordingly. The borrower continued to pay interest on the bonds. Though in insolvent circumstances, he made no attempt to raise money on the lands in other quarters. It was clear that there had been no fraud on his part; that he had intended to give the borrowers a title over all the lands included in the valuation, and that the restriction on the security was an inadvertency. He was sequestered, and after adjudication and confirmation, but before the trustee was infeft, the mistake was discovered.

Mr Stuart granted what was called a bond of corroboration, or a cumulative and corroborative disposition in security, narrating the bargain and understanding of the parties, and containing a specific conveyance of the whole subjects to which the first bond was *intended* to apply. A reduction was brought by the trustee. The bench, in a hearing before the whole court, were, by a majority, in favour of the reduction. But there were other objections besides that under the act 1696. The point on which the largest number of judges concurred was, that after sequestration, the

bankrupt's hands were tied up, and that any attempt, on his part, to alter the disposition of his property was null; and it was on this ground that the decision was affirmed.

The question, however, which has chief reference to the present subject, was the following, "Whether, so far as regarded the act 1696, the present case did not truly fall under the rule as to *scots debita*, the money having been advanced, not merely under a covenant for a security to be granted over the whole lands, but on the faith that it had been granted; so that no trust had, for a single moment, been placed, either on Stuart's personal security, or on a personal obligation, on his part, to grant an heritable security, so as to constitute a prior debt in the sense of the statute." It cannot be said that the decision was founded upon the view, that the deed was struck at by the act; for of thirteen judges who gave their opinions, six only—Lords Gillies, Mackenzie, Medwyn, Corehouse, Balgray, and Cringletie—gave opinions favourable to reduction under the act; and the last named, considering that the other grounds of reduction were sufficient, merely hinted a general concurrence with the others on this branch of the subject, and did not offer a deliberate opinion. Lords Craigie and Fullerton doubted if the act 1696 applied; but, finding sufficient reason for reduction on other grounds, thought it unnecessary to exhaust this question. The Lords President and Moncreiff were opposed to the reduction on any of the grounds stated. Lord Glenlee, who thought the trustee had no title to pursue a reduction, was decidedly of opinion that the deed did not come within the act. Lords Justice-Clerk and Meadowbank concurred in this opinion.

This decision, then, is clearly not a solemn judgment to the effect, that the rectification of a mistake in the implementing of a bargain, by the granting of a new deed within the sixty days, comes within the operation of the act 1696. It gives us the very decided opinion of five out of thirteen judges, that such is the case; the leaning of a sixth to this view; and the opinion of five decidedly against it. It becomes important to consider the criticism which the opinions of these judges afford on the previous decisions above noticed, in relation to the completion of inchoate contracts. It will be observed, that from these cases the case of Stuart differs in this respect: When a bargain is made, and the proper deeds stipulated for *in gremio* of the bargain are unexecuted, that which the parties intend, from the beginning, to be the concluding act of the transaction has not been performed. The transaction is unfinished, and the parties know it to be so. In this case, however, the transaction was finished, though not to the purport intended by the parties. The final deed was executed. The borrower was not delaying the execution of the intended bond from accidental circumstances. The lender was not waiting to receive it. There is a specific difference between the fulfilment of a delayed transaction, and the correction of an erroneously accomplished one; and, because the one should be found to fall under the act, it does not appear that

that alone is a sufficient reason for the other likewise coming under the act. In the opinion of Lords Gillies, Mackenzie, Medwyn, and Corehouse, it is said, "When a loan is made, and a security stipulated, an interval frequently occurs between the advance of the money and the execution of the heritable bond or disposition by the debtor, which may be longer or shorter, according to the nature of the deed, the local situation of the property, the state of the titles, and many other circumstances. Now, it has been repeatedly decided, that an interval of this nature does not expose the deed to challenge, although the sasine upon it is not taken till after the sixtieth day. In the case of *The Bank of Scotland v. Stewart & Ross*, an interval of seven weeks was not held fatal. In a more recent case of *Cormack v. Gardner's Trustees*, though six months had intervened, the deed was sustained; but this decision is scarcely reconcileable with the decision in the preceding case of the Trustees for Brough's Creditors *v. Duncan & Co.* But it will be particularly observed, that in these, and several other cases to the same effect, though there was an interval between the loan and the granting of the disposition or warrant of infeftment, that interval had elapsed previous to the period of constructive bankruptcy; and the debtor, while yet *sui juris*, and before his hands were tied up by the statute, had done all that was incumbent upon him, or that he could do towards the completion of the security.

"But all these cases are perfectly consistent with the doctrine, that if a loan is agreed upon, the money advanced, and a security stipulated, but that security not executed by the debtor till after the sixtieth day, any attempt on his part afterwards to remedy the defect is unavailing. It is true that in *Houston & Co. v. Stewart*, an opposite view was taken by the court; but the decision was unanimously disapproved of in the case of *Brough's Creditors*, which has just been cited. And in *Maclean v. Primrose*, we are told by Mr Bell, that Lord Meadowbank accompanied his judgment with a note, in which he condemned the decision in the case of *Houston & Co.*, as clearly contrary to principle, since an obligation to grant a preference cannot constitute an actual preference on an heritable subject in a question with other creditors; and accordingly, it is one of those decisions which is frequently quoted, and as often disregarded by the court. In *Robertson-Barclay v. Spottiswoode*, which occurred some years after that of *Houston & Co.*, an heritable bond had been granted within the sixtieth day by a husband to his wife, in terms of an obligation in his marriage articles, the bond was sustained by a narrow majority; but a reclaiming petition being presented, the case was compromised, and Mr Bell informs us, on grounds which he states, that if it had again come on, there is reason to believe the ultimate judgment would have been different. If *Mansfield, Hunter, & Co. v. Cairns* did not proceed on the specialty noticed by Lord Coulston in Hailes' report of the case, it falls under the stigma so often affixed to the judgment in *Houston & Co.* The

distinction, therefore, appears to be settled between cases in which the debtor has done his part before the period of constructive bankruptcy, and those in which he executes the deed subsequently to that time. On this point reference may be made to the Trustees for Brough's Creditors *v.* Spankie, which is of the same date with that of the same party against Duncan, and also to Maclean *v.* Primrose, just cited. Mr Bell seems to think, that in the Bank of Scotland *v.* Stewart, the court returned to the doctrine laid down in the case of Houston & Co., which had been so often and so solemnly condemned; but that opinion must have arisen from his overlooking the distinction now explained, for the deed executed by the bankrupt, though some time after the advance, was of a date, as already mentioned, long before the sixtieth day."

A distinction is thus introduced, calculated to create a new interpretation of the clause of the act, which fixes (for the purposes of the act,) the date of heritable securities as that of the infestments. As elsewhere remarked, the principle has been, to inquire whether the transaction is a *novum debitum*, and if it be a *novum debitum*, then, as it is not affected by being within the sixty days, there is no occasion for inquiring at what time infestment was taken; but if it be not a *novum debitum*, then comes the inquiry, whether the infestment took place within the sixty days, and if it did, the deed is reduced. But the above opinions would seem to open up a new inquiry,—viz. Whether, independently of the infestment, which is not in reality his own doing, the granter of the deed has himself done any act within the sixty days.

The general rule is, that the granting a security or conveyance for a *novum debitum* within the sixty days is valid. Another rule to be interpreted with this is, that if not for a *novum debitum*, the date of the infestment is to be held the date of the transaction. But the practical effect of the above opinion would be to introduce a third rule not very compatible with these,—viz. that in certain cases, if a deed be granted *before* the sixty days, it is to be held a *novum debitum*, so as not to be affected by the sasine on it coming within the sixty days; but if itself granted within the sixty days, it is not to be held as for a *novum debitum*. This is inferrible from the words, "It will be particularly observed, that in these and several other cases to the same effect, though there was an interval between the granting of the disposition or warrant of infestment, that interval had elapsed previous to the period of constructive bankruptcy; and the debtor, while yet *swi juris*, and before his hands were tied up by the statute, had done all that was incumbent upon him, or that he could do, towards the completion of the security." It is humbly conceived, that this proceeds upon a new view of the operation of the act 1696. It seems to place the commencement of the sixty days on a par with the commission of an act of bankruptcy in England, as something which ties up the debtor's hands, and nullifies all acts

committed by him, fair or unfair, unless those which are specially excepted from nullification by statute. The act 1696 does not, in other matters, "tie up" the debtor's hands; it only strikes at preferences to creditors; in other respects the debtor may do with his property what he pleases; and, as will be found elsewhere, his dealings with bankers in the discounting of bills, drafts, &c., and his sales made in the ordinary course of business, though they may have the effect of allowing the buyer to plead compensation, are good. The question ought to be, therefore, not whether the debtor's hands are tied up, but whether the act which he has done is a *novum debitum* or a preference. It has to be stated, moreover, that though, in the cases of the Bank of Scotland, and of Cormack, it was the fact that the last act done by the debtor himself was clear of the sixty days, yet that circumstance does not appear to have been founded upon either in the pleadings or the judgments. Some remarks are given elsewhere as to the influence which it may be supposed that a long delay may have on the character of the transaction. On the whole, the author cannot help thinking, that in any future questions of a like character, the opinion given in this case by the Lord President and Lord Moncrieff, who considered that the date of the deed, as distinct from that of the infestment on it, is not to be considered, would be found to be most consonant with the train of previous decisions, and would prevail. They say:—

"But the just rule of construction established by the case of Johnson, reached beyond the precise point of the case itself. It might happen that there was a clear specific contract for the advance of money, and the granting instantly, as the condition of such advance, of a special security over a defined heritable subject; and yet neither the conveyance nor the infestment might be made at the instant of the advance made; did that fall under the principle of the act 1696? So far from its being a fraud to grant the security subsequently, the fraud must lie in not granting it as soon as possible, or at any time when demanded. But if the security was to be considered as of the date of the sasine, it could signify nothing whether the deed of security giving warrant for the sasine was before the commencement of the sixty days or not, if the sasine itself was within that period. The principle of the question never could or did depend on this. The point held was, generally, that the statute did not at all apply to *nova debita*, which have been explained by the decisions to mean, all cases in which the advance of money has been made on a specified agreement for the particular security which happens not to be made or completed till within the sixty days. This may happen where the whole transaction has been within the sixty days; or it may happen where the transaction is earlier, and the warrant for infestment is also previously given, but no infestment is taken till within the period; or it may be where the transaction is concluded before, but by breach of contract, or accidental circumstances, the proper deed has not been executed till

after the commencement of the sixty days. Is this last case in any degree more within the plain provision of the statute than either of the other two? Is it the case of fraud or fraudulent preference contemplated by the statute? We think that it is not; and, that the more general rule, finally and fully adopted by the court, as we apprehend, embracing it, has been founded on a correct and equitable view of the nature and purposes of the statute.

. On this deduction of authorities, we venture, with all deference to other opinions, to think, that there never was any question of law more fully or deliberately settled than this is. There are the three cases of Mansfield, Houston, and Robertson-Barclay, before 1793; and, independent of the cases of Mitchell, More, and Maclean, there are, since that time, the three cases of the Bank of Scotland, Cormack, and Bontine, the last affirmed in the House of Lords. In the three first cases, and in the last, the deed of security was decidedly granted within the sixty days; and substantially it was so in Cormack's case also. Throughout all the cases, we find no trace of any distinction founded on the deed being before the sixty days or not; and in the case supposed to be chiefly adverse to the principle, that of Duncan, the bond actually was six months before the sixty days. So that, in every view the decision in it was wrong.

"We look, then, at the present case. The contract, and the *bond fide* advance of the money on the faith of it, are beyond all doubt. If the case were made identical as to the security with that of Duncan, by supposing the bond of corroboration to have been granted six months before the sixty days, it must, according to every opinion which we have yet heard, be sustained, contrary to that decision. But it is identical in the material point with the first three cases, and the last, in so far as the act 1696 is involved. We must therefore conclude, that the act 1696 does not apply to it, and that it cannot be held to apply to it without departing from the law, as it has been long and very carefully settled."

(288.) *Delivery of Commodities.*—It seems to be decided, that delivery of goods, in fulfilment of a bargain, where the price is paid, though coming within the sixty days, is not struck at by the act.

This proposition must be stated dubiously, because, in the case where it was brought forward, *Gibson v. Forbes*, 9th July 1833, 11 S. 916, there was an alternative conclusion, on which the delivery was supported, and the bench were much divided. A gentleman had purchased wine of wine-merchants, and paid for it. To suit his convenience, and at his request, they kept the wine for him in separate binns, having it separately entered in their binn-book, and deducted from their own stock. The first question was, whether this was a delivery; and it was mixed up with the farther question, whether an exchange which had been made,

by mutual consent of parties, of this wine for other wine, affected its position in this respect. The wine was sent to the proprietor within the sixty days. A portion of the Court being of opinion that the delivery in the wine-merchants' binns was a good delivery, it was unnecessary to rest the decision on an answer to the question, whether delivery within the sixty days was good? On that question, however, pretty full opinions were returned. And here it has to be observed, that the bench on this subject seems divided into two parties. The judges who held that the sending to the purchaser would not come within the act, were, the Lord Justice Clerk, and Lords Glenlee, Cringletie, Meadowbank, Moncreiff, and Fullerton. It may be remarked, that none of these were among the judges who, in the case of Mansfield, occurring just a few days before, (see p. 248,) were of opinion that the validity of the deed there questioned was affected by the act 1696; and that all of them, with the exception of Lord Cringletie, expressed their decided opinion in favour of the deed. In the opinion subscribed by the first five judges above-named it is said:—

“But we are of opinion, that this is not a case to which either the letter, or the spirit of the act 1696, applies. It is not the case of any thing given in satisfaction or security of a prior debt; there never was any prior debt existing, distinct from the specific engagement to hold and deliver this subject, in consideration of the price paid in the moment of contracting. We think that it is a clearer case against the operation of the statute than the case of a contract for the loan of money, where it is *pars contractus* that a specific security shall be granted, and that security is not granted or completed till within sixty days of the bankruptcy. For here the specific thing, as an *unum quid*, is not only defined in the contract, but is actually separated and laid aside from all the other property of the bankrupt, that the party may take full implement when he pleases. We apprehend that the defender would have been entitled to demand and compel instant delivery, at the very time when the wine was shipped; that no apprehensions of bankruptcy would have justified Lyall and Cargill in refusing it; and that no other party could by any means have interfered to prevent it. And, if the defender was entitled at that moment to compel delivery, we are of opinion, that the delivery made to him cannot be challenged.”

In a very curious and learned commentary on the meaning of the statute, given on that occasion by Lord Fullerton, there are views thrown out which seem to show, that, from the commencement of practice in regard to it, its intent and meaning have been, to some extent, misunderstood. If this criticism be correct, it would appear that the fulfilment of *bargains*, whether by payment of money, or delivery of some other subject, was not intended to be struck at. After a course of practice to the contrary, a return to this interpretation would, it is feared, overturn more law than it would restore; but some attention to this meaning may perhaps save farther divergence.

"Now, it appears to me, that a delivery of moveables of this kind, not made as an equivalent or substitute for the payment of a different debt, but forming in itself the specific performance of an existing obligation so to deliver, does not fall within either the letter or the spirit of the act 1696.

"The statute is directed against assignments, deeds, &c. by the bankrupt, 'in favour of any of his creditors, either for their satisfaction or farther security in preference of other creditors.' There is nothing said of payment, and, looking at the preamble and declared object of the statute, I think that the term satisfaction was used in that sense in which it is in legal language commonly and even technically distinguished from payment. 'Satisfactum autem accipimus quemadmodum voluit creditor licet non sit solum,' &c. Digest, 13. 7. l. 9. 'Præter solutionem in specie, plures alii sunt modi quibus vel ipso jure, vel saltem ope exceptionis obligatio tollitur, et liberatio contingit, puta satisfactio, compensatio,' &c. Voet. lib. 46, tit. 3, s. 17. According to Pothier, in commenting upon the first of these passages,—'Observez une différence entre le paiement et la satisfaction. Le débiteur a le droit de contraindre le créancier à recevoir le paiement de la somme pour laquelle la chose lui a été donnée en nantissement,' &c. 'Au contraire, on ne peut satisfaire au créancier, qui n'est pas payé qu'autant qu'il y consent.' Pothier, tom. 2, p. 960. But what is of more importance, the same distinction is made by Lord Stair, in writing only a few years before the passing of the statute. 'The more proper way of dissolving obligations is by performance, by which they attain their effect, and that is either by payment or consignment; the more improper ways are acceptilation, compensation,' &c. And when he comes to treat of acceptilation he proceeds, 'Acceptilation with us may be of any obligation, and requireth no stipulation; but as the acknowledgment of payment liberates all the debtors, so the acknowledgment of any satisfaction which imputeth payment, or any thing accepted as equivalent, hath the same effect, and therefore, we use more the term of satisfaction than acceptilation.' In another passage, when treating of the act 1621, he distinguishes in the same way, 'where a debtor of an entire estate pays his lawful creditor, or satisfies him by dispositions or assignments.'

"According to the sound construction, then, of the letter of the statute, it appears to have been directed, not against payment in the proper sense of the term, that is, the actual performance which the creditor was bound to accept of, in extinction of the debt, as originally constituted, but against satisfaction, i. e., those substitutes for such actual performance which could only be the result of a new and voluntary arrangement between the debtor and the creditor. The same conclusion is deducible from a consideration of the spirit of the statute; for although it might be reasonable and expedient to invalidate on the ground of constructive fraud, any new transaction entered into a short time before bankruptcy, with the consent of the creditor, for the

satisfaction of a debt which the debtor could not pay, there could be no ground for subjecting to the same penalty that payment or delivery which the debtor was bound to make, and the creditor to accept, by the force of the original obligation.

“Accordingly, on the one hand, I am aware of no case in which delivery of moveables in such circumstances has been held to fall under the act 1696. In those generally referred to, viz., *Forbes v. Debtors of Forbes*, 27th Jan. 1715, M. 1124, and *Smith v. Taylor*, 18th July 1728, M. 1128, and *Crawford v. Stirling, Elchies, Bankrupt*, No. 28, the goods were delivered not in performance of any previously existing obligation to deliver, but truly in satisfaction of a prior money debt. On the other hand, in the most comprehensive class of debts, and certainly the most unequivocally expressed in the statute, viz. money debts, payments in cash are sustained; and I confess I do not see any reasonable ground upon which they can be so sustained, except that payment, in the proper sense of the term, is not struck at by the statute. The reason assigned by Lord Elchies, in the case of *Forbes v. Brebner*, Jan. 26, 1751, Elchies’ Notes, p. 50,—‘There are no words in the act 1696 that can apply to payments of money, which is not in the sense of law a deed,’ is clearly unsatisfactory. In the first place, the term deed might just be as aptly applied to the delivery of money, as to the delivery of goods. But, 2dly, this ratio is completely excluded by the late decision of *Speirs v. Dunlop*, 30th May 1827, in which, on a remit from the House of Lords, it was decided, that a payment in cash by a bankrupt is reducible under the act 1696, when the transference of the money is made not properly in payment, i. e. extinction of a money debt, actually due, but in security of a debt which might eventually be due by the party who paid to the party who received.”

It has to be observed, with reference to the authority of this case, that while six judges, as above, thought the transaction did not come within the act, four expressed an opinion that it did.

SECT. 4.

PERSONS WHO MAY PURSUE, AND FORM OF ACTION.

(289.) The persons entitled to pursue under the act, are those who were the bankrupt’s creditors at the time when the security or preference was granted; subsequent creditors have no title to pursue.

Man v. Walls & others, 25th July 1702, M. 1006. Professor Bell considers that the law as thus settled by this leading case is contrary to the spirit and object of the act. 2 B. C. 209.

(290.) The date of the preference is taken as at the date of that part of the transaction which brings it under the operation of the act; and thus, in those cases where the date of the infetment is held that of the security, a creditor whose debt is anterior to the infetment, though it be posterior to the warrant of infetment, may pursue.

Roberton-Barclay v. Lennox, 19th Nov. 1783, M. 1151. So also, it is to be presumed of the completion of an assignation.

(291.) A legatee, to whom an heir is debtor for the legacy, is not a creditor with a sufficient interest to reduce a preference by an heir to a creditor of his ancestor.

Borthwick v. Hilson, 16th June 1838, 16 S. 1158. The ancestor had died solvent, and the bankruptcy was that of the heir, eight years after the succession had opened to him. The legatee was a creditor of the heir, yet not entitled to compete with a creditor of the ancestor.

(292.) *Sequestration*.—A trustee on a sequestrated estate, against which there are creditors on grounds of debt anterior to the date of the preference challenged, will have a right to pursue for behoof of the creditors, the certified extract of his act and warrant being his title to pursue.

2 & 3 Vict. c. 41, § 49. Many of the cases quoted above are instances of trustees on sequestrated estates. There seem to be no instances where the trustee's title is objected to, on the ground of his representing no creditor anterior to the deed; and it can scarcely ever happen that there is a sequestration in which there is no such creditor. See as to the act 1621, p. 156. It is held that an interim factor may pursue in circumstances of emergency, (2 B. C. 209,) and his title will be the like certified extract.

(293.) *Cessio*.—Where the bankrupt has obtained the benefit of *cessio*, the title on which a reduction of a preference granted by him may proceed, will be an extract of the decree of *cessio* appointing the pursuer trustee, or a disposition *omnium bonorum*.

6 & 7 Will. IV. c. 56, § 16.

(294.) The assignee under an English or Irish fiat of bankruptcy, may pursue, and his title will be a certificate of appointment under the seal of the court of bankruptcy, in the case of the former, and a certificate of appointment

under the hand and seal of a commissioner of bankruptcy in the case of the latter.

1 & 2 Will. IV. c. 56, §§ 25, 28, 29, applicable to England. Under the old system of granting a commission of bankruptcy, before the establishment of the court of bankruptcy, the title was an extract of the assignment of the commissioners. 6 Geo. IV. c. 16, §§ 63, 95. The Irish provision will be found in 6 & 7 Will. IV. c. 14, § 78. By that act, one commissioner only was appointed; but another has been added by 7 Will. IV. and 1 Vict. c. 48.

(295.) An assignee, under the insolvent debtors' acts of England or Ireland, respectively, will have to produce, for his title, a certified copy of the order of the insolvent debtors' court, vesting the estate in him as a provisional assignee, or of his appointment as assignee.

1 & 2 Vict. c. 110, § 46, applicable to England; 3 & 4 Vict. c. 107, § 34, applicable to Ireland. See, however, the title which may be acquired by an assignee of an insolvent, who does not pass through the insolvent debtors' court, but who obtains relief under the statutes for the relief of insolvents not traders, or traders whose debts do not exceed £300. 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.

(296.) The pursuer must libel on a title *prima facie*, showing him or his author to have been a creditor of the bankrupt.

A retired bill was not a good title to an acceptor, who said he had retired it, pursuing a reduction of a preference by a joint acceptor. He would have to proceed, in the first instance, by action of relief and constitution. *Bett v. Arnott & Macash*, 27th June 1828, 6 S. 1031.

(297.) Where the bankrupt has arranged with his creditors by a composition contract, according to the sequestration act, he may pursue a reduction of a preference, though granted by himself, if he state it as objected to by him in his offer of composition, send notice to the creditor, and reserve the right in his composition contract.

2 & 3 Vict. c. 41, § 119. This provision exceptionally sanctions such a reduction, by enacting that the bankrupt is not to be entitled to object to the security held by any creditor, unless he has stated his objection, and given notice as above. From this, with the state of the law under the old act, it is inferred that the new act, under these conditions, allows the challenge. Under the old act, it seems to have been understood that the

debtor could make such a challenge, if he reserved the right to do so in his offer of composition, and due notice were sent to the creditor affected. See *Bryce & Graham v. Monteith, Bogle & Co.* 20th Feb. 1818, F. C. and the cases adduced and commented on, 2 B. C. 459. It may be questioned whether it be essential to the bankrupt's exercising such a right under the new act, that it be stipulated for by him in his offer, as above. But it has to be observed, that unless where, by special law or contract, the bankrupt takes up the rights of the trustee, he is, on being discharged, in the position in which he would have been, had there been no sequestration. The person entitled to challenge a deed under the act, is a prior creditor affected by it, but he is not in that position, nor does he represent one in that position. His taking up such a right would be, indeed, an infringement of a general principle of law, that a man is not to profit by his own wrong. It will be seen in the case of *Brown v. Bedwell*, cited below, that the granter of a deed could not reduce it under the other branch of the act. It might be held, however, that the notice of objection required by the new act, is a virtual stipulation for the exercise of the right. The cautioner's agent, in drawing an offer of composition in such circumstances, should, nevertheless, not only state the objection, but make the conveyance by the trustee of his right of objection to the bankrupt, a specific stipulation in the offer.

(298.) *Court of Session.*—The action is competent only to the Court of Session, its proper form being an action of declarator, reduction, and repetition libelling the act. As such a preference is not null, but merely reducible, the challenge is incompetent by way of exception, or in the form of an ordinary action.

Jaffray v. Horne, 14th Nov. 1828, 7 S. 11; *Blinchow's trustee v. Allan & Co.* 22d Jan. 1831, 9 S. 317; see 2 B. C. 210. In the case of *Maxwell v. Drummond's trustees*, 21st Jan. 1823, 2 S. 130, where the sheriff had granted a decree to compel the bankrupt to sign a deed, a suspension was brought in the Court of Session, in which, *inter alia*, it was maintained that the ground of the proceedings was a deed "null on the act 1696." The bill was refused generally on the ground that the deed in question "appears to be a valid and legal deed." A reduction afterwards brought of this deed was repelled, but the Second Division, on that occasion, did not hold the refusal of the bill by the First as *res judicata* of the validity of the deed—apparently because it had not been brought under challenge in the proper form.

(299.) Unless a creditor will profit by the reduction, either by having some fund thrown open to his diligence, or otherwise, he has no interest to pursue.

So found in *Dixon, Langdale, & Co. v. Cowan*, 2d Dec. 1828, 7 S. 132, where a bank bill having been remitted to brokers with special instructions to apply it in retiring a particular bill, and they, instead of so doing, credited it, and so employed it in reduction of their own balance. The holder of the bill intended to be retired, not challenging the transaction, it was held inept for the trustee in a sequestration to do so, as the creditors had no interest, it being the same to them whether the brokers, or the creditor in the bill, ranked on the estate.

SECT. 5.

EFFECT OF THE REDUCTION.

(300.) The effect of the reduction on the creditor's right under the deed, is to render it, in respect of the bankrupt estate, as if no such deed had ever existed.

Mann v. Reid and others, 1st Dec. 1704, M. 1183. There was an attempt in this case to make the act the instrument of an equitable adjustment of the bankrupt's estate; and it was alleged that the deed "neither was nor could be simply reduced, but only in so far as the defenders thereby got preference to the pursuer, which could only bring him in *pari passu* with them." But the deed was decerned to be null *simpliciter*, and as the pursuer had done preferable diligence, the holders of the deed had no remedy for their original debt. Where it is not counteracted by sequestration or the other equalizing processes, the effect of the act will undoubtedly still be the same. See also *Smith v. Taylor*, July 1728, M. 1189.

(301.) A claim which the creditor may justly have acquired against a third party, in connexion with the transaction, is not affected where it takes nothing from the bankrupt estate.

Low v. Bell, App. 12th June 1827, 2 W. S. 579; *Low v. Duncan*, App. 12th June 1827, 2 W. & S. 584. Here the bankrupt had replaced dishonoured bills by indorsing the bill of a third party, to whom, in consideration of his acceptance, he made an alienation. It was held in the House of Lords that the holder of the bill not being a party to the alienation, was not bound to give up the bill, or precluded from recourse on it against the acceptor.

(302.) *Effect on Right given up.*—The reduction clears away the attempted preference, and negatively places the creditor in his old situation. But it has no positive action in his favour; and if there is any right which he

formerly possessed, and which he gave up on account of the preference, or allowed to lapse on account of his having obtained the preference, it will not be reconstructed in his favour by the reduction.

Black v. Cuthbertson, 15th Dec. 1814, F. C. Here the deed was not reduced under the act, as it was not defended; but the rights of parties were placed in the same position as if it had been reduced. The right given up by the creditor at the time when he got the reducible preference, was a bill accepted by himself and his son. In the action for restitution of it the son only appeared. Lord Meadowbank, (senior) Ordinary, in his interlocutor, "Having considered this representation, where it seems to be argued that a reduction on the act 1696 implies an obligation to replace the parties in *statu quo*, as in a *restitutio in integrum*, and that the pursuer is entitled to reduce his delivery of the bill, even *quoad* William Cuthbertson's [the son's] interest in that delivery," dismissed the action. It does not follow, however, that because the creditors' previous security is not reconstructed by the reduction, that all right to it is destroyed. The right of the creditors to reduce is limited by the effect which the preference may have in cutting down the fund for their payment. It would seem that if, had the old security not been given up for the new and reducible, it would have been effectual against the creditors, their interest in the reduction is limited to the difference; and that, if they pursue a reduction, the creditor will be entitled to have his old security restored to him. On this point, however, there are no decisions, unless one which became final in the Outer House, as respects its bearing on this point, be held as a precedent. One who was a debtor to a bank on certain bills, indorsed to the bank, after he was made bankrupt, other bills, in consideration of which his own were given up to him. A reduction being raised, the bank brought a multiplepinding, in which they claimed, in the event of decree of reduction passing against them, *inter alia*, restitution of the bills they had delivered to the bankrupt. The Lord Ordinary found them entitled to the redelivery.—Balfour v. Miller, 18th June 1822, 1 S. 501. See this question critically discussed 2 B. C. 232-233. It appears at all events, from the case of Black, that the interests of a third party—a co-obligant in the security given up by the creditor—cannot be affected by any right which the creditor may have to the restoration of his security.

(303.) If there be a valid alternative title by which the creditor may hold the subject of the reduced preference, the reduction will not affect it. Thus, where a draft in favour of a banker on a sum deposited in his bank, is reduced, the banker is not thereby deprived of any right in the shape of retention or otherwise, which he may have over the sum.

See the case of *Blinchow's Trustees*, referred to at large elsewhere, (p. 212,) and as to this subject especially, the points which came before the court, 3d Dec. 1828, 12th June 1829, and 22d Jan. 1831, 9 S. 317. Here there being a question as to whether the payments of certain instalments of a bond to a bank were struck at, a cheque drawn for one of the instalments was reduced. The funds, however, on which the cheque so reduced was drawn, were in the hands of the bank; and the interlocutor directed, "that the said sums are to be replaced to the account-current between the parties, in the same way and manner as if the said order or cheque had never been granted." The bankers then maintained that they had a lien over the amount in security and payment of their debt. A new issue was then sent to a jury, to determine whether the funds were deposited in the due and ordinary course of trade, or for the purpose of creating an undue preference. After this verdict, however, it turned out that the original summons in the action did not embrace cash payments, of which a portion of the fund so deposited with the bank consisted. To supply the defect, the pursuer raised a supplementary action, and moved that it should be conjoined; but the court dismissed it with expenses, "reserving to the pursuer to bring a new action of reduction or repetition, if otherwise competent." It was contended, that the cheque being reduced, it was left open to the pursuers to claim the sum by a petitory conclusion in their supplementary summons; but, as Lord Balgray remarked, "The decree of the court in the first action merely reduced the cheque, so as to throw the money back from the bond account into the account-current between the bankrupt and the defenders. Every thing else was entire. The bills, or the cash in the account, remain there in the hands of the defenders, who plead a lien over it, which you cannot overcome without the aid of a farther reductive conclusion."

(304.) If an individual creditor pursue the reduction, he takes no advantage by it, beyond what accrues to those other creditors, whose means of making their claims good against the bankrupt estate are as far advanced, or who are, in virtue of any of the equalizing arrangements, legally on a par with him. The effect of the reduction is merely to lay the subject of the preference open to the diligence of creditors.

As posterior creditors are not entitled to take advantage of the act, (p. 255,) it might be presumed that they should not be allowed to carry any advantage from a reduction at the instance of a prior creditor. There is no case, however, in which an attempt has been made to limit the operation of the reduction, which is always considered as a complete demolition of the preference, opening up the fund to all claimants. Cases might be supposed in which the harshness of an arbitrary application of

this rule might open up the consideration how far it must be held as absolute. Creditors have been arresting and poinding. They afterwards reduce the security of a creditor, who, trusting to its efficacy, has done no diligence. All the other property is, in the meantime, carried off by the arresters and poinders, with whom, as they are all within the four months after the bankruptcy, while he is not, he cannot compete. If it were a necessary element in the law reducing preferences, that the creditor should be conscious of the approaching bankruptcy of the debtor, and exhibit an intention to injure the other creditors, there would be more appearance of equity in a principle which would make his attempt injurious instead of beneficial to his interest. But, as elsewhere shown, and particularly in the opinion of the Lord Chancellor in *Blinco's Trustees v. Allan & Co.*, 28th Aug. 1833, 7 W. and S. 57, it is the intention of the debtor, not that of the creditor, that is considered in a reduction; and it would certainly be hard, that, by having a preference put into his hands which, until it be reduced, may prevent him from having any ostensible debt on which he can do diligence, he should be deprived of his ordinary privileges as a creditor.

The rights of a creditor holding a reducible preference, however, as well as those of creditors posterior to the preference, constitute a branch of the law not yet adjusted either by legislation or decisions. Where there is no sequestration, yet a general bankruptcy, Professor Bell recommends the creditors to vest their rights in an assignee, so as to entitle them all to the benefit of the remedy. He continues, "It does not seem safe to trust to the success of a reduction raised by one or two creditors. It has been found, for example, that a creditor against whom a reduction was raised was entitled to insist for an assignation from the pursuer of his debt and diligence, in order that he might make effectual his relief against the debtor's other funds." (2 B. C. 232.) The case in which this occurred, *Mann v. Reid*, 19th Dec. 1705, M. 3368, was a very peculiar one. The security in favour of the one creditor, and the diligence possessed by the other, were viewed as competing rights, and an analogy was drawn between the case and that of an inhibitor reducing a security to the prejudice of his inhibition. The principle which has, however, in later times regulated the application of the act—that of a simple reduction—seems to render any analogy with the right of an inhibitor, which extends only to the protection of his own diligence from being defeated by a voluntary deed, inapplicable. See above, p. 74, and p. 259.

SECT. 6.

SECURITIES FOR FUTURE DEBTS.—CASH
CREDITS.

(305.) The act 1696 enacts, that “any disposition or other right that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infeftment following on the said disposition or right, but prejudice to the validity of the said disposition and right as to other points, as accords.”

The intended application of this clause appears to be where there is a security granted without any equivalent being given for it at the time by the other party. It does not appear that security for faithful discharge of an office comes under the act. In such a case, the consideration for the security—the trust placed in the individual—is given at the moment. The act is intended to strike at cases where only one party—the debtor existing or contingent—is bound; but, in the case of faithful performance, there is a mutual contract from the commencement, see above, p. 148. Yet, it must be noticed that an opinion, bearing to be that of Lord President Campbell, but very vaguely reported, (M. 1238,) is to the effect, that “such a security [for faithful performance] would fall under the sanction of the act 1696.” A conveyance in real warrandice accompanying a sale of lands, though its exigibility is not only future, but contingent, appears to come under the same exemption from the act; as the consideration for the security—the purchase of the lands supposed to run a certain risk of eviction—is brought into existence at the moment of the transaction. In the opinion above referred to, such a case is admitted as an exception. A security given to a cautioner, at the time of his coming under the obligation of cautionry, seems to be exempt for the same reason; see as to the onerosity of such a transaction reductions of preferences under the act 1621,—(p. 148.) As below stated, however, (par. 309,) if the cautionary obligation for which such security is given be for future advances, the security will be reducible. See the subject critically discussed, 2 B. C. 235, and the discussion of the case of *Stein's Creditors v. Newnham Everett & Co.*, 14th Nov. 1789, M. 1158.

(306.) *What is immediate value?*—To save a transaction from the operation of the act, it is not necessary that a sum equivalent to the value of the security should be

paid in cash. A bill, bond, or other document, which the creditors of the granter of the security can attach, will be a sufficient consideration. The cases to which the act applies are those in which it is in the power of the holder of the security to give or to withhold the counterpart.

Dempster v. Nevay, 17th Feb. 1750, M. 10290, where, according to Kilkerran, "it was by all agreed, that, taking it as an absolute obligation for the £11,265 not advanced, that could have been affected by a creditor of Sir James's, it would have been secured by the infestment, no less than if it had been advanced at the date of the bond, nothing being more ordinary than to make up a part of a sum by a bill or bond for a balance. But, on the other hand, suppose it not to have been such an obligation as was affectable by a creditor, but an obligation pendant upon the will of Sir James, whether he would require the money or not, as, at pronouncing the last interlocutor, the majority of the court understood it, there was as little doubt but what the last was the just judgment;" viz., a judgment against the bond, so far as it did not represent money advanced at the moment, or in so far as the security given in exchange for it "did not constitute a debt," and was so situated, "that no action of debt could lie upon" it, "but only an action to create a debt, or to lend money." As remarked by Kilkerran, it is ordinary to make up "a part of a sum by a bill or bond;" but undoubtedly the same rule would apply where the whole consideration for the security is so constituted. In *Maxwell v. Drummond's Trustees*, 2d July 1825, 4 S. 137, the whole of the debts which the security was found capable of covering, consisted of certain sums in which the grantee was bound to the granter "by bills or otherwise." See also *Bank of Scotland v. Bank of England*, 1st March 1781, M. 14,121.

(307.) Where it is the intention of the parties to exchange the security for a present advance, any delay in the paying of the money, bringing it beyond the date of the infestment, will not bring it within the act.

Dunbar's Creditors v. Abercromby, 30th July 1789, M. 1156. Here, the circumstance that the security was not intended to be for a future debt, was palpably indicated by its not being delivered up to the grantee till the whole sum was paid, although in the meantime infestment had been taken. In *Fulton v. Lead*, 8th July 1825, and 22d June 1826, 4 S. 156 and 740, where the security was supported, though a part of the money was unpaid at the date of the sasine, it had been agreed that the sum should remain in the lender's hands till a search of encumbrances was produced, and the recorded sasine delivered to him, an obligation for the payment of the money when that condition should be ful-

filled being granted in the meantime. The rule in this case seems, indeed, to be the precise converse of that applicable to the completion of securities, under the other clause of the act (p. 241.) In the one case, when there is a delay in completing the security, and in the other, when there is a delay in advancing the money, the transaction is not struck at if it was merely the completion of a present bargain.

(308.) *The granter of a deed* cannot defend himself against an action for implement of it, on the plea that the deed is null under this branch of the act.

Brown v. Bedwell, 3d Dec. 1830, 9 S. 136. See *Maxwell v. Drummond's Trustees*, 21st Jan. 1823, 2 S. 130. It may be inferred that the granter of the deed has no title to pursue a reduction. The act is for the benefit of creditors, and pleadable solely by them.

(309.) If, instead of being arranged by a direct heritable security, a transaction which would in that case come within the act be managed by the intervention of a cautioner, who receives an heritable security, the security is struck at.

So found in *Brough's Creditors v. Selby*, 2d March 1791, M. 1159; *Geddes v. Smith's Creditors*, 1st Dec. 1810, F. C., M. Syn. 75, which were both cases of security for cash credits, occurring before provision was made for sanctioning such a security.

(310.) *An absolute disposition* is not affected by the act, and it has thus been settled, that when any of the transactions against which it was levelled, is accomplished by such a disposition, converted into a redeemable security by a back-bond from the disponent, it cannot be touched.

Riddel v. Niblie's Creditors, 16th Feb. 1782, M. 1154; *Drummonds v. Campbell*, 2d March, 1791, Bell's Cases, 54.

(311.) *Cash Credits*.—By an exceptional provision in a later statute, a real security and infestment may be given “in security of any sums paid or balances arising, or which may arise, upon cash accounts or credits.” Such a security may also be validly given to any person becoming cautioner on such cash-account or credit. It is a condition of the security, that “the principal and

interest which may become due upon the said cash-accounts or credits, shall be limited to a certain definite sum, to be specified in the security; the said definite sum not exceeding the amount of the principal sum, and three years' interest thereon, at the rate of five per cent."

54 Geo. III. c. 137, § 14. For a critical inquiry into the practical meaning of this clause of the old sequestration act, particularly as to the question whether it will cover advances of merchandise on the credit of a previous security, see Bell's Commentaries, II. 240–242. The meaning of the terms limiting the amount covered by the security, would seem to be this,—The utmost sum to which the drafts of the holder of the credit will be honoured being specified, the security may be made to cover that amount, and three years' interest on it.

BOOK IV.

MERCANTILE SEQUESTRATION.

CHAPTER I.

PERSONS WHOSE ESTATES ARE LIABLE TO BE SEQUESTERED.

SECT. 1. TRADING PERSONS.

(312.) The persons of whose estates sequestration may be awarded, are classified as follows :—"Any debtor subject to the laws of Scotland, who is or has been a merchant, trader, manufacturer, banker, broker, warehouseman, wharfinger, underwriter, artificer, packer, builder, carpenter, shipwright, innkeeper, hotel keeper, stable keeper, coach contractor, cattle dealer, grain dealer, coal dealer, fish dealer, lime burner, dyer, printer, bleacher, fuller, calenderer, and generally the estates of any debtor subject as aforesaid who seeks or has sought his living, or a material part thereof, for himself, or in partnership with another, or as agent or factor for others, by using the trade of merchandise by way of bargain, exchange, barter, commission, or consignment, or by buying and selling, or by buying and letting for hire, or by the workmanship or manufacture of goods or commodities."

2d and 3d Vict. c. 41, § 5. This description is much more specific than that of the old act, which simply included "any person, being a merchant or trader in Scotland, in gross or by retail, or a banker, broker, or underwriter, or a manufacturer or artificer, and in general any person who, either for himself, or as agent or factor for others, seeks his living by buying and selling, or by the workmanship of goods or commodities, or by any of the foregoing occupations, or holds a share in any such undertaking." 54 Geo. III. c. 137, § 15. A comparison of the

above with the enumeration of the species of traders liable to the bankrupt law of England, will show that the description in the Scottish law has been widened with a view to make it include the same classes of persons who are liable under the English law.

"All bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise, by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities." 6 Geo. IV. c. 16, § 2.

An addition was made to this list by 5 & 6 Vict. c. 122, § 10, viz. "Livery stable keepers, coach-proprietors, carriers, ship-owners, auctioneers, apothecaries, market-gardeners, cow-keepers, brick makers, alum makers, lime burners, and millers."

In comparing the two descriptions together, (viz. that of the new Scottish act with that of the English act,) some differences will be found, arising out of parallel diversities in the commercial practices and nomenclatures of the two countries. The English definition includes "a scrivener," who is defined as "a person intrusted with the money of his employer, to lay it out for him as occasion offers." (Smith's Mercantile Law, 522. See *Adams v. Malkin*, 3 Camp. 534, where an ordinary practising attorney was found not within the definition. *Hamson v. Harrison*, 2 Esp. 555; *Hutchinson v. Gascoigne*, 1 Holt, 507.) The scrivener's operations resemble those of the broker, with this difference, that the latter deals solely in convertible public stock, while the former deals in investments in real property, or any other kind of security. In Scotland the banking system, which, by the allowance of a moderate interest, reduces the temptation to find other investments, renders the transactions which constitute the money scrivener's business less common than in England; while, as the lender's money is generally left in the bank till the security is ready, it makes the same class of transactions, so far as they are followed, be accompanied with less risk. The law agent generally acts the part of the money scrivener in Scotland. The history of the practice of sequestration shows, that when such a person conducts money transactions on a large scale, there is a great desire felt by his creditors to get the machinery of the sequestration system adapted to the realization and distribution of his estate, through some collateral occupation which may bring him within the class of traders mentioned by the act. A law-agent, however, is not within the act, nor will the conducting of transactions like those of an English money scrivener bring him

within it. It may be a question, however, how far a slight variation in the style of business conducted by him, may bring a law-agent under the definition of a broker. Thus, in the case of Fraser's sequestration, 20th Dec. 1828, 7 S. 217, among other facts stated, and on which the Court awarded sequestration, "after expressing great doubts," was, "that he had acted as a commission agent in his private capacity, having been in the practice of raising money for third parties by negotiating bills, on which he charged commission, and by which he gained a considerable part of his livelihood."

Among the persons to be found in the Scottish and not in the English enumeration, are coal dealers. The decisions under the old act brought this class, as well as lime burners, within the law, (see the cases referred to in 2 B. C. 313.) At first there was a distinction taken between those operations, such as lime burning, by which a new substance is produced, through some manufacturing or chemical process, out of the raw material taken from the earth, and those other processes, such as coal mining, in which there is no change made in the nature of the commodity. Thus, in *Stewart v. Greig*, 15th Feb. 1812, (F. C., M. *Syn.* 95,) where one applied for sequestration, on the ground that he dealt in coal, which he raised from his land and sold, "doubts were entertained by the court whether he could be sequestrated any more than tenants of land who sold their crop, who were especially excepted by the act of Parliament. Stewart then condescended further, that he likewise raised limestone, which he burned with the coal, and sold in the state of manufactured lime." "Lord Gillies considered the process of burning lime, by which both the coal and limestone were changed, and a new substance different from either to be produced, to be distinctly entitled to the denomination of a manufacture." In conformity, however, with the purposes for which the bankrupt laws are established, the distinction came to be drawn, not in relation to the nature of the commodity produced, but to the method of transacting business; and it came to be fixed, that one who invests capital in any kind of mining operation is as much a suitable subject of sequestration as any merchant or manufacturer. In England, though, as already stated, neither of the above classes of persons was included in the Bankrupt Act of 6 Geo. IV., a series of decisions settled that they come within it when they are really traders. Thus it was found that the making of bricks, the raising minerals, the manufacture of lime, &c., when the purpose is to employ the produce of the soil, for the benefit of the producer, or of his tenants, &c., does not bring a man within the act; but that, when any of these occupations is followed as a substantive and independent trade, it will bring its follower within the act. *Ex parte Gallimore*, 2 Rose, 424; *Paul v. Dowling*, 1 M. & M. 263; *Heane v. Rogers*, 9 B. & C. 578; *ex parte Burgess*, 2 Glyn. & J. 183; *Newton v. Newton*, Cooke's, B. L. 71; *ex parte Ridge*, 1 Rose, 316; *ex parte Gardner*, 1 Rose, 377; *ex parte Gibbs*, 2 Rose, 38.

In England there are included "persons insuring ships, or their freight, or other matters, against perils of the sea," and in Scotland the same class of persons is indicated by the word, "underwriter," which includes partners in fire and life insurance companies, whether mere holders of stock or managing partners. *Paterson v. Marquis of Huntly*, 12th Nov. 1839, 1 D. 1.

(313.) *Illustrations of particular terms in the enumeration.*

Banker.—It has been held that the agent of a chartered bank cannot be sequestrated as "a banker." *Kellie v. Crawford*, 13th Nov. 1821, 1 S. 127; under the old act, where the word banker occurs in the same manner as in the new. The person was agent for the Bank of Scotland.

Broker.—Under this term, pawnbrokers and shipbrokers have been included in England. (Smith's Mercantile Law, 522.)

Innkeeper.—Under this term in England there was found included a lodging-house keeper who sold her guests food for profit. *Smith v. Scott*, 9 Bingh. 14.

Cattle Dealer.—**Grain Dealer.**—The special exception in the act, mentioned below, par. 316, limits these terms to persons who are in the commercial sense of the term buyers and sellers.

Buying and Letting for hire.—It is supposed that these words may bring shipowners within the act, though they are not specially enumerated, (Bell on the Recent Statutes, 131.) Under the old act, where there is no reference to letting on hire, one was sequestrated, on the court "being satisfied that he was a shipowner, and had been engaged in fishing adventures in Scotland." *McCracken v. Brown*, 11th July 1822, 1 S. 559. Shipowners are included in the English enumeration as above.

Horse Dealer.—Although this class of trader is not particularly stated, there is no doubt that it comes under the general term of seeking a living "by buying and selling." Under the old act sequestration having been awarded against a horse dealer was recalled, because he had no license.—*Ogilvie v. Robertson*, 29th May 1824, 3 S. 86. It has been decided in England, however, that the illegality of the trade will not take the trader out of the statute. See *ex parte* Meymot, 1 Atk. 196; *Cobb v. Symonds*, 5 B. & A. 516. In *Wright v. Bird*, 1 Price, 20, and *ex parte* Gibbs, 2 Rose, 38, it was so decided as to a horse dealer without license.

Dealing not to be an incidental transaction.—It is a requisite of a person coming within any one of the specific definitions of the act, that he carry on the trade there mentioned as a dealer, prepared in general to serve all customers; and that it be not a mere adjunct to enable him to carry on a business of a different nature, *e. g.* where a farmer, as above, burns lime for his own use; or an incidental act, as where a person has bought too much of a commodity, and sells part of it, or where an executor disposing of a testator's stock, buys other ingredients to mix with it and make it market-

able. See for English cases of mere incidental trading, *Montague and Ayrton's Law of Bankruptcy*, p. 5, *et seq.*

(314.) *Difference between particular enumeration of trades and general classes.*—Between the classes of persons whose specific pursuits are given in the enumerated list, and those who are subsequently described in the general clause applicable to one who seeks his living for himself, or as an agent or factor, “by using the trade of merchandise, by way of bargain, exchange, barter, commission, or consignment,” &c. a distinction has been established. In the former class of cases, when the bankrupt comes within the definition, by embarking as a shareholder in any of the adventures enumerated, he may be sequestrated, however disproportionate his interest in it may be to his other pecuniary transactions. Under the general clause, no one comes within the act, unless he “seeks or has sought his living, or a material part thereof, for himself, or in partnership with another,” by the adventure.

This distinction was brought out in the case of *Paterson v. Marquis of Huntly*, 12th Nov. 1839, 1 D. 1. Here the Marquis was sequestrated as a banker and underwriter. The shares in a banking and an insurance company which brought him within this description, were, together, not equal to £400,—being about £375 worth of bank stock, and £15 worth of insurance stock. The petitioning creditor,—the manager of the North of Scotland Banking Company, in which the shares were held, was himself a creditor to the extent of £10,000, and the total claims exceeded half a million. This decision is undoubtedly sufficient to make out that the qualification of seeking his livelihood, or a material part thereof, does not refer to the individuals coming under the specific catalogue in the clause. It could not be said that the Marquis of Huntly was seeking a material part of his livelihood by investing £15 in an insurance office. At the same time, it is to be regretted that in the pleadings, and the opinions delivered in this case, the distinction was not brought more fully out. Lord Gillies merely remarked,—“It is true that in the new bankrupt act, after enumerating many distinct classes of men, including bankers and underwriters, who shall be liable to sequestration, there is also a very general provision added as to those who seek their ‘living, or a material part thereof,’ by buying and selling, &c. But I apprehend that the qualification of thus seeking one’s living, or a material part thereof, is meant to reach only the very general provision in which it is incorporated, and is not meant to go back to the earlier part of the section. I do not think that the words were meant to exclude any banker or underwriter, &c. from the benefit of the act, but were intended to describe

what persons, not holding any of the specific designations previously given, but being mere buyers and sellers, &c. of one kind or other, should be held truly to fall within the act." And Lord Mackenzie in concurring, said, "The statute expressly specifies certain classes of persons to whom it is to reach, and then adds a very general clause respecting those who use the trade of merchandise, by way of bargain, &c. buying and selling, &c. It appears to have been thought, that as every body does buy and sell to some extent, the sweep of this clause would be universal, unless some qualification were engrafted on it for the purpose of limiting and defining it. And, accordingly, the words were inserted, requiring that the persons falling under this general clause, and not belonging to any of the classes first enumerated, should be persons making, [more strictly seeking to make,] their living, or a material part thereof, in one of the modes comprehended in that very general clause."

The distinction here created, if followed out in the application of the act, will doubtless render it free from some of the ambiguities of the old act. After an enumeration of special professions, much more limited than that in the new act, there was there the general clause, "and in general any person who, either for himself, or as agent or factor for others, seeks his living by buying and selling, or by the workmanship of goods or commodities, or by any of the foregoing occupations, or holds a share in any such undertaking." Here the two qualifications of seeking a living, and of holding a share, are not disjunctive from, but conjunctive with, the whole clause defining the classes of persons liable to be sequestrated; and it was thus rendered very difficult to assign what amount of trading was necessary. The qualification of gaining a living, seemed to imply that the debtor had a material part of his fortunes involved in the adventure on which he is sequestrated. That about holding "a share in any such undertaking," seemed to imply that where it was a partnership, or joint stock matter, any interest in it, however small, would suffice. According to the existing act, however, it seems to be the law, that persons to whom certain denominations are applicable, come within the act, however little business they may transact in that capacity; and that the other commercial classes only come within it if their business holds a prominent position in their avowed means of living. The application of this distinction will necessarily have the effect of excluding from the operation of sequestration those traders who do not come within the specific catalogue, unless they have an interest,—considerable in proportion to their means, embarked in the trade. Joint stock companies of shipowners are of common occurrence, and such concerns have many points of resemblance to a joint stock insurance company. As a shipowner, however, can only come in under the general clause, by a strict interpretation of the above distinction, it must appear that the debtor "has been seeking his living, or a material part thereof," as a shipowner, before he can be sequestrated. The same

doctrine would extend to the holder of stock in a railway company, (if there be any one which is not constituted by statute,) or in a canal, or other conveyance company.

Where the necessary qualifications attach, it will not affect the debtor's liability to sequestration, that his nominal profession, or his position in society, are such as to exclude the notion of his wishing to hold himself out as a person who has embarked in the adventure in connexion with which sequestration is awarded. In the case above noticed, the bankrupt was a marquis. Under the old act, a clergyman was sequestrated as "a printer, publisher, and stationer."—A. B. petitioner, 26th Nov. 1823, 2 S. D. 526. And a similar principle would rule under the new act, provided the debtor answered the requisition of seeking to make a material part of his living by such a profession. See *Lugton v. Molle*, 31st May 1831, 9 S. 947; *Fraser*, 29th Dec. 1828, 7 S. 217; *Cook v. Cuthill's Trustees*, 21st Feb. 1829, 7 S. 452. By the old act, "common labourers or workmen for hire," were specially excluded.—See the exclusion enforced in a case where the debtor was an operative weaver, sometimes weaving his own web, and employing at least one assistant, *Rodger v. Kay*, 23d Jan. 1834, 12 S. 317. There is no such exclusion in the new act. Under the general clause, the qualification of seeking a material part of the living by a mercantile profession would exclude such a person; but if he held any stock which would bring him within the particular list, it would be difficult to find a reason for refusing sequestration.

(315.) *Concerted qualification*.—A person who collusively obtains shares in a company, with money advanced, that he may thus qualify himself to apply for sequestration, will not thereby bring himself within the class of persons whose estates may be sequestrated.

Carnock, Brown & Co. v. Rainsford, 20th Dec. 1833, 12 S. 264, under the old act. Such a case must stand on the circumstances. In this instance, one of the concurring creditors had advanced money to enable the bankrupt to purchase trifling shares in two joint-stock companies, and he immediately afterwards petitioned for sequestration. If he had not himself petitioned, but had left the application to be made by his creditors, the same principle would, of course, have been acted on.

(316.) By a series of special exceptions, it is not competent to sequester any person "as a holder of stock in any of the public or national funds, or of India stock, or as a partner in any company incorporated or established by act of parliament, or by charter; or as a landholder or farmer, unless such landholder or farmer be *bonâ fide* a dealer in cattle, not the produce of, nor grazed nor

worked on his farm; or unless he be a dealer in grain, not the produce thereof."

The exclusion, as applicable to an incorporated company, will not necessarily extend to one constituted by royal letters patent, in virtue of the 7 W. IV. & 1 Vict. c. 73, although the circumstance, owing to which the exclusion is created,—the limitation of responsibility,—may be a feature of the company. The clause while excluding the awarding of sequestration against the estate of any individual, in any of the enumerated capacities, does not preclude his being sequestrated in some other capacity. That portion which refers to landholders and farmers would, therefore, have been more clearly expressed if it had borne that nothing in the act was to prevent a landholder or farmer from being sequestrated as a cattle dealer or grain dealer. The agent preparing a petition for sequestration, in such a case, will avoid confusion by simply stating the capacity which brings the debtor within the class of persons, in the general specific list of traders who may be sequestrated, instead of using this part of the section, and calling the individual "a farmer," who is "*bonâ fide* dealer in cattle not the produce of, nor grazed nor worked on his farm," &c.

Under the old act a drover, cattle dealer, and sheep dealer, who offered to prove that, while he paid rents to the amount of £2650, he carried on a separate trade in sheep and cattle to the extent of £3000, was found not to come within the requisites. Grieve, 4th Feb. 1817, F. C.

(317.) *Where Debtor applies.*—In the case where the debtor consents and applies for sequestration, with the statutory concurrence, the only requisite besides that of his coming within one of the classes of traders above set forth is, that he be personally "subject to the laws of Scotland." It is not necessary that he should have been made bankrupt, or that he has had a domicile in Scotland, or that his business has been conducted in Scotland.

Act, § 5. In *Hunter v. Gardner*, 3d Feb. 1831, 9 S. 383, a sequestration which had been awarded against a debtor on his petition, as an insurance broker, was recalled, because the insurance office with which he was connected was an English one. This would not, it may be presumed, be an objection under the present act.

(318.) Where the debtor does not consent it is necessary, 1. That he has been made notour bankrupt; or has retired to the sanctuary, and remained there for sixty days, either continuously or not, within the space of twelve months; 2. That he has followed the business which brings him within the class of traders liable to seques-

tration within Scotland; and, 3. That he "have also, within a year before the date of presenting the petition for sequestration, resided or had a dwelling-house or place of business in Scotland."

Act, §§ 5, 7. In *Plock & Logan v. Wallace*, 16th Dec. 1841, 4 D. 271, an attempt was made to set up the rule that, by the meaning of sect. 7, a person who had retired for sixty days to the sanctuary might be sequestrated although he had not resided or had a dwelling-house or place of business in Scotland within the year. The court, however, found that the residence in the sanctuary was only an equivalent to notour bankruptcy, and that it only operated in conjunction with the other two requisites. See next par.

It is, as already stated, no objection that the diligence on which the bankruptcy is founded is under judicial discussion, as by the validity of the ground of debt being appealed. *Scot v. Ker*, App. 9th Dec. 1830, 4 W. & S. 441; see above, p. 202.

(319.) *Trader who has given up Business.*—It is not laid down in the act, or fixed by a course of decisions, whether any lapse of time intervening between the bankrupt's giving up trade and the application for sequestration, will render the application inept. It has, however, been decided under the old act, 1st, That the lapse of ten years from the time when the debtor ceased to trade will not exempt him from sequestration on debts which were subsisting during the time when he traded; and, 2d, That a debtor cannot be sequestrated on debts incurred after he has ceased to be a trader.

Grant v. Baillie, 20th May 1830, 8 S. 778; *Ogilvie & Co. v. Simpson*, 4th March 1837, 15 S. 746. In the case of *Grant*, sequestration was awarded where the only act of trading on the part of the debtor was his having opened a spirit shop in 1819, and continued it for a year. The debt on which the petition was founded was not connected with the trading, and was of older date. The defender averred that every debt contracted in relation to his trading was paid on his giving it up. This was not admitted; but in its bearing on the law, it was in the same position as if it had been so, for it was not considered a relative subject of inquiry. The decision was affirmed on appeal, after the opinion of the English judges was taken as to the law of England in the like cases, 25th June 1832, 6 W. & S. 40. See the case of *Low*, 8th July 1815, stated in 18 F. C. p. 182, n. where the debtor had given up trading for nine years. In the case of *Ogilvie*, the trading had been given up for upwards of sixteen years. The debts of the concern were paid up at its termination, but with borrowed money; and the bankrupt, in having taken the

benefit of *cessio* in 1836, admitted that the debt so contracted in consequence of his unsuccessful trading speculation continued to press on him. In refusing sequestration, a clear distinction was taken on the bench between debts which had subsisted during the trading, and those which, though they might be occasioned by it, were of later date. Lord Mackenzie observed, "If a man finds himself engaged in an unprofitable trade, and has a friend willing to lend him a sum of money to pay off all his trading debts, and if he gives up trade, and pays all the trading debts with that money, I think he ceases to be liable to sequestration. His trade is at an end: his debts incurred in trade are at an end: and the only debt remaining is that which he contracted towards his friend, after he had ceased to carry on trade." It will be observed, however, with reference to precedents under the old act, that the present act includes, not only persons who *are*, but persons who *have been* traders, &c.; and thus it may be held, that, by the terms of the act, the period during which the person has ceased to conduct business cannot be considered.

(320.) *Partnership*.—Sequestration may be awarded of the estate of a company trading in any of the forms which will bring an individual within the operation of the act.

Act, § 6. In the case of a trading company there is, of course, no room for the application of the distinction between those methods of trading in which any amount of interest is sufficient to authorize sequestration, and those others where a material part of the living is sought by the trade. The circumstance that the operations of a company bring it within any one of either the particular or the general denominations, must be sufficient. Difficulties might, however, arise in cases where the main profession of the company is not of a trading character, while it has transacted business in one of the capacities stated in the act. If a firm of writers to the signet hold stock in an unchartered bank or insurance office, is it to be doubted that the firm could be sequestrated as bankers or underwriters? Suppose, however, that it transacted business in one of those general departments in which the qualification of seeking a living or a material part thereof is essential—would it then be necessary to show that the members of the firm sought their living or a material part thereof by the business in relation to which sequestration is sought against them?

(321.) If the company do not consent to the application, it is necessary, 1st, That a partner has been rendered notour bankrupt for a company debt; 2d, That the company has carried on business in Scotland in the occupation that brings it within the act; and, 3d, That within a year before the date of presenting the petition, either

a partner has resided or had a dwelling-house, or the company has had a place of business, in Scotland.

Act, § 6. These are not statutory requisites where the company consents, being attached solely to that clause of the section which applies to companies not consenting. The third qualification is not expressed in a manner to make the period "within a year" applicable as well to the company having a place of business in Scotland, as to a partner residing there, the words being, "and a partner have, within a year before the date of presenting the petition for sequestration, resided or had a dwelling-house, or the company have had a place of business, in Scotland." It would have been clearer had it been—"and within a year before the date of presenting the petition for sequestration, a partner have resided or had a dwelling-house, or the company have had a place of business, in Scotland." The context, however, clearly shows that the qualification of being within the year was intended to apply to both alternatives.

SECT. 2.

ESTATES OF PERSONS DECEASED.

(322.) The estate of a debtor who has died may be sequestrated, whether he was a trader or not, if at the time of his death he "resided or had a dwelling-house, or carried on business in Scotland, and was, at that time, owner of heritable or moveable estates in Scotland."

Act, § 4.

(323.) Sequestration may be awarded immediately after death,—1st, If the deceased had granted a mandate to apply for sequestration; 2d, If he was, at the time of his death, notour bankrupt; 3d, If he had remained in sanctuary for sixty days, either continuously or not, within the space of twelve months immediately preceding his death; or, 4th, If "his successors shall concur in the petition, or renounce the succession." In all other cases, six months must have elapsed between the debtor's decease and the awarding of the sequestration.

Act, § 4. See below as to other precautions relative to the form of procedure, applicable to those cases where sequestration cannot be awarded immediately on decease, p. 293.

(324.) It has been found that, in the strict interpreta-

tion of the statute which includes in general terms "any deceased debtor," sequestration must be awarded where the statutory requisites have been fulfilled, though the debtor had died before the passing of the act.

So found in two cases both decided on the same day.—*Macdonald v. Auld, &c.* and *Newall's Trustees v. Aitchison*, 13th June 1840, 2 D. 1104, and 1108. In the former case the debtor had died in 1836, and the estate had been under the management of an executor creditor confirmed. In the other case, the debtor had died in 1822, and the estate had in the meantime been under trustees appointed by the deceased's settlement, and subsequently under the management of a judicial factor. Part of the estate was in England, and on that part the judicial factor had been appointed trustee by the Court of Chancery. In both cases the court considered that the terms of the statute took the question out of their discretion; nor was it considered that the expression in the fifteenth section, which requires the Lord Ordinary, in the case of a deceased debtor, to "issue the other orders, as herein before provided in the case of any other debtor, in so far as circumstances will permit," gave any right to the court to allow circumstances to influence the question of the granting or withholding.

(325.) It is not necessary in a petition that the estates of a deceased debtor shall be sequestrated, presented after six months have elapsed from the date of his decease, to show, or to allege that he was insolvent. It is sufficient that the applicant makes affidavit to, and produces vouchers of a debt of the statutory amount.

Waddell v. Waddells, 21st Jan. 1841, 3 D. 411. It was here objected, that the whole tone and tenor of the statute indicated that it was intended to apply only to insolvent estates, but it was considered, 1st, That the terms of the act were peremptory, in their relation to the estate of any deceased debtor, and 2d, That by drawing a distinction between the method of awarding where the debtor had been bankrupt or in the sanctuary, and the method applicable to other cases, solvent estates were distinctly included in the latter class. The present case was a claim by a widow, against the estate of her deceased father-in-law, who had been a party to her marriage contract. The debt was disputed, but this objection was repelled without any discussion. It thus appears, that whoever has a *jus crediti* against the estate of any person deceased, may, if his claim be not satisfied, bring the whole estate under the operation of the machinery for judicial realisation and distribution, which is provided by the sequestration act. A person who has a mere *spes successionis* would of course have no right to petition for sequestration in such a case, for the petition

must be by "one or more creditors." But wherever a family provision is of the nature of a *jus crediti*, there seems to be little doubt that a sequestration may be resorted to, as a means of adjusting the rights of parties. That it is reducible under the act 1621 or otherwise, would be no valid objection to the ground of debt of a petitioning creditor. In cases of difficulty, a sequestration might thus be made the means of completing a title.

CHAPTER II.

APPLICATION, AWARDING, AND RECALL.

SECT. 1. THE PETITIONING CREDITOR'S QUALIFICATION.

(326.) The creditors who may apply for the sequestration of an individual or company, or who may effectually give their concurrence to an application, are those who have pecuniary claims, either liquid or illiquid, provided they be not contingent. The petition or concurrence may be by any one creditor whose debt is not less than £50; by any two whose united debts amount to not less than £70, or by any three whose united debts amount to not less than £100.

Act, § 8. The special admission of a creditor on a future debt, is a feature of the late act. In the interpretation of the old act, however, it became a fixed principle that such a creditor might petition or concur. 2 B. C. 320. As to the difference between future and contingent debts, see below, as to qualifications to vote, &c. By 5 & 6 Vict. c. 122, § 9, the qualifications of petitioning and concurring creditors in England are reduced to the same amount at which they are as above fixed for Scotland.

It seems to be an undisputed principle, that the creditor is entitled to add to his debt interest to the date of the petition, if it be a debt either by law or compact bearing interest. On the same principle, he may charge exchange and re-exchange, and other costs arising from the dishonour of bills. If the debt is future, it seems to be equally undoubted, that the creditor must deduct discount. This will be in the general case, a sum equal to the legal interest on the debt for the period between the date of the petition and that when the debt becomes payable; but if the debt be one on which there is a discount of a greater amount, a corresponding deduction must be made. See 2 B. C. 321.

(327.) *Character of the debt.*—The debt need not be in any way connected with the trading operations of the debtor; and it may have been contracted before he had become a trader liable to the act.

Grant v. Baillie, 20th May 1830, 8 S. 778. It is a more difficult question, whether a debt which has not subsisted during the trading—a debt which has originated after the debtor has ceased to be a trader—will qualify? In the case of *Ogilvie & Co. v. Simpson, &c.* 4th March 1837, 15 S. 746, sequestration was refused. In this case, however, it was stated in the debtor's answers to the petition, and not contradicted, that all the trading debts were paid off; and thus, the merits of the question lay, not in the sufficiency of the petitioning creditor's qualification, but in the debtor's liability to sequestration. See this case examined above, p. 275. It is thus not decided whether it be a good objection to the concurring or petitioning creditor's debt, that it dates from a period subsequent to the trading. In England, it seems to be fixed law, that a fiat of bankruptcy cannot be awarded on a debt, unless it has been contracted, or was in subsistence, while the debtor was a trader. *Meggot v. Mills*, 1 Ld. Raym. 286; *Butcher v. Easto*, Dougl. 295.

(328.) A cautioner or co-cautioner, who is responsible to the extent of, and has had to pay as much as amounts to the statutory qualification, may apply for the sequestration of the principal debtor.

Greenhill & Hunter v. Cumine, 17th Jan. 1824, 2 S. 624. Here, the debt was a very large sum, and there could be no doubt that both qualifications were united in the creditor. He was liable to the statutory amount, and he had paid that amount. It would seem to be inferrible from the above case, that wherever there are joint creditors, one may petition where the debt is divisible, and he has paid the statutory amount. That he may recover a portion from a co-obligant, would not be a relevant objection, when he has not recovered it. See below, p. 285.

(329.) It is no objection to a debt, as the foundation of a petition for sequestration, that it has been acquired for a consideration less than its amount,—as by being assigned by the original creditor to a purchaser. It is no objection that it has been so acquired after the debtor's bankruptcy, and that the statutory amount is made up, by adding to the debt originally due to the petitioner a debt which he has purchased from another creditor.

Robb v. Forrest, 29th May 1830, 8 S. 839, affirmed, 5 W. & S. 740, where all these points were tried. This was under the old act, which required a debt of £100 in the case of one creditor petitioning. In this case, the creditor's own debt was £80, and he had bought a debt of £55 for £18, making his total advance £98. It was pleaded, that his right as a petitioning creditor should be limited to the sum he had thus advanced, or that if the acquired debt should be taken as at its full nominal value, it should be considered so only in connexion with the person to whom it belonged at the date of the bankruptcy, when the two debts, as the debts of two individuals, did not amount together to the statutory qualification for two—£150. It was thus decided, as stated above, that the statutory amount may be made up, by adding to the debt originally due to the petitioner a debt which he has purchased from another creditor. It would seem to be a legitimate conclusion from this, that a person may create a qualification, by purchasing up any number of debts which, added together, will make up the statutory amount; but, in the absence of any decision founded on an inquiry into all the consequences of such a doctrine, it would be unsafe to lay it down as law. See considerations on this subject, 2 B. C. 321, and see the English case *ex parte Lee*, 1 P. W. 782, and Cooke's B. L. 25.

(330.) Where the bankrupt is not the primary obligant on a bill, it is only a contingent debt against him, and is not a good ground for awarding sequestration.

Morrison v. Turnbull, 28th Jan. 1832, 10 S. 259. The bill was drawn by the bankrupt, and accepted by a solvent third party.

(331.) *Composition debt*.—Where a sequestration has been wound up by a composition contract, the amount of the debt is limited to that of the promised composition, and a composition creditor cannot petition for a second sequestration, unless the composition on his debt be of the statutory amount.

Saunders v. Renfrewshire Banking Co. 10th March 1827, 5 S. 565. It does not appear that it would be any objection to a qualification to petition, that the petitioner's debt was anterior to a *cessio* awarded to the bankrupt, and that it appeared on his list of debts. It has been so decided in England, where, under the insolvent debtors' act, the debt was entered on the insolvent's schedule.—*Jellis v. Mountford*, 4 B & A. 256. It does not appear that, when an extrajudicial arrangement for a composition has been made, the creditor's debt is to be considered as limited to the amount so contracted for. See 2 B. C. 322.

General Remarks.

(332.) The foundation of a petitioning creditor's claim, is simply a debt due to him by the bankrupt, which is not contingent. It does not affect the debt, that it is secured on the estate, or that there is a cautioner liable for it. In his oath, the creditor must state whether he holds any other persons liable, and whether he holds any security; but it is only *before voting* that he is to qualify his claim, by valuing and deducting the security, (§ 11.) It would appear that the same company debt which will qualify for the sequestration of the company, will qualify for the sequestration of each individual partner, (§ § 5 & 16.) Each partner is liable for the whole debt, and each may relieve himself and the company by paying it, (§ 15.) See on this subject farther on, as to qualifications for voting and drawing dividends.

Difficult questions regarding the character of the petitioning creditor's debt may arise out of the law of prescription. It would seem that the long prescription is a total extinction of the debt; but, in the case of those prescriptions which only exclude certain methods of proving the debt, it would appear that the admission inferred in the bankrupt's application, would enable a concurring creditor to proceed on such a debt, while the bankrupt's privilege of not being bound by it, would render it inept as a ground for a creditor's petition, (see 2 B. C. 323, and Commentaries on the Recent Statutes, p. 46.) In England, a debt barred by the statute of limitations is not allowed to be proved, and it is questioned if it would found a petition, (*ex parte* Seaman, 15 Vesey, 479; *ex parte* Roffey, 19 Vesey, 468, 2 Rose, 245.) In England, it is held that a petitioning creditor's debt must have been in subsistence before the act of bankruptcy. Cooke's B. L. 31; Moss v. Smith, 1 Camp. 489; see Hill v. Harris, 1 M. & M. 448. There is not, however, so strict an analogy between an act of bankruptcy in England, and the occurrence of notour bankruptcy in Scotland, as to lead to the inference, that a debtor cannot be sequestrated on a debt arising subsequently to notour bankruptcy. In claims which are of the nature of damage, Professor Bell distinguishes between those which, arising out of breach of contract, carry their amount in the face of the transaction, in the same manner as a claim for the price of goods sold, and claims of reparation for injury, the amount of which has still to be ascertained. The former class of debts he thinks may support a petition, but not the latter, (ii. 319, 320.) It is held in England, in conformity with the latter principle, that damage for a tort does not form a good ground for a petition, before judgment, (*ex parte* Charles, 16 Vesey, 256.) It has been decided in England, that a cross acceptance is not a good ground for a petitioner, unless where the creditor has paid his own acceptance, (Sarratt v. Austin, 4 Taunt. 200.) In considering any partial payments or securities, the debtor is entitled to abandon and put out of view any payment or security which can be reduced under

the act 1696, or otherwise, (see B. C. ii. 323; and see the same principle in England, as to void payments, *Mann v. Shephard*, 6 T. R. 79; *ex parte* Miller, Buck. 283.) In England it is held that a bill of exchange which has arrived at maturity, must carry with it proof of due negotiation, to be a good petitioning creditor's debt against the drawer. *Cooper v. Machin*, 1 Bingh. 426.

(333.) Where there are doubts as to the qualification of a petitioning or concurring creditor, the court may supersede the petition *hoc statu*, in order that a supplementary petition may be presented and conjoined with it.

A. B. petitioner, 9th July 1840, 2 D. 1357.

SECT. 2.

THE PETITION, OATH, AND VOUCHERS.

(334.) *Statutory Requisites of the Petition.*—The application for sequestration is made by petition to the Lord Ordinary. It is presented in writing to the Clerk of the Bills. It may be signed by parties or by counsel. If it is a petition at the instance of the debtor himself, to which the creditors only give concurrence, it must be signed by him, or must be accompanied with a mandate, authorizing sequestration of his estates to be applied for. The same rules apply to a partnership. If the application is for sequestration of the estate of a deceased debtor, within six months from the debtor's death, it must be accompanied by a mandate to apply for sequestration, left behind him by the debtor, or must state that he died notour bankrupt, or must state that he had been, as above, sixty days in sanctuary.

Act, §§ 4, 5, 6, 7, 12. The above are the essentials laid down in the clauses relating to the substance of the petition, but from the context of the act,—as to debtors not consenting, the requisites in par. 318 must be stated according as they apply, along with the debtor's definition, as per par. 312: as to partnerships, the requisites in par. 320: and as to a deceased debtor, when the application is within the six months, those of par. 323. In the bill, as originally drawn, it was provided that a procurator might sign for the creditors petitioning for sequestration; but that clause was lost. It is part of the act, (§. 13,) that “the division of the court to which the sequestration shall be appropriated may be marked” on the petition; but the enactment is not imperative. Professor Bell observes that concurrence may

infer an admission of the petitioning creditor's debt, barring the bankrupt from objecting to his voting on the discharge or composition, claiming, &c.; but will not establish the debt "as sufficient to sustain the petition, or as a qualification to vote, or act, or draw a dividend," (on the Recent Statutes, p. 137.) This latter view is in conformity with a decision under the old act, *Crawford v. M'Kerrow*, 23d June 1838, 16 S. 1197.

(335.) *Time of Presenting*.—If the petition be without the debtor's concurrence, and he is alive, there is a limitation of time, within which, after the bankruptcy, or other criterion of liability, it may be presented. When it is presented on the ground of bankruptcy, it must be within four months after the date of the notour bankruptcy. When it is founded on the debtor having been sixty days in the sanctuary, it must be presented within four months after the expiration of the sixty days.

Act, § 8. The months are calendar months, according to the interpretation clause, (§ 3.)

(336.) In the case of a debtor whose bankruptcy dates from imprisonment, continuing in prison, the four months run from the date of imprisonment, and that he is in prison after the expiry of the four months, will not be a ground for sequestration on a petition so dated.

Cochran v. M'Laren, 31st Jan. 1835, 13 S. 387. It would seem to be the meaning of the act, that, in relation to the sixty days in sanctuary, the day after the lapse of the sixtieth day is to be held the first of the period of four months, and that a petition after the last day of the four months will be inept, although the debtor may have continued in sanctuary longer than the sixty days.

(337.) If the date of the petition bring it within four months after the date of a concurrence of circumstances constituting notour bankruptcy, it will be no objection that the debtor had been made notour bankrupt on some other diligence at an earlier date, and that he has continued in a state of bankruptcy during the interval.

Balfour v. Pedie, 20th Feb. 1841, 3 D. 612. It would be difficult to apply this principle to a residence of sixty days in sanctuary, as the act does not require the residence to be continuous. It would appear, that in the event of a petition in such a case, a year being marked off backwards from the date of the petition, the question would be—at what point of time during that year

had the debtor been sixty days within the year in sanctuary? That, from that day the four months would have to be counted, and that residence in sanctuary before the commencement of the year would not be counted either for or against the bankrupt.

(338.) *Method of stating the Debt in the Oath.*—To entitle a creditor to petition for the sequestration of his debtor, or to concur in a petition for sequestration by the debtor, he must lodge along with the petition an oath to the verity of the debt claimed by him. If there be any person besides the bankrupt liable for the debt, or any part of it, he must, in his oath, specify that fact. If he hold any security over the estate of the bankrupt, or of any other obligant, he must likewise specify that fact. If he thus specify any obligants or securities, he must farther state that he holds no other obligants or securities than those so specified. If he hold no other person but the bankrupt bound, and no security, he must depone to that effect.

Act, § 9. The requisites must be precisely complied with. A petition was dismissed, where the creditor stated that he held no other security, but did not state that he held no other person liable. He said that he had no security for his debt but the vouchers, which he produced; and it was pleaded that these vouchers showed that he had no claim on any other obligant; but it was found that the requisites of the act were imperative, and that no equivalent for them could be taken, *Irvine v. Commercial Bank of Scotland*, 16th July 1842, 4 D. 1532.

(339.) *Affirmation.*—In cases where the act requires an oath to be taken, the provisions refer to an affirmation, “where, by law, such affirmation shall be required to be taken in place of an oath.” The persons who have the privilege of making affirmation where others are required to make oath, are, 1st, Quakers; 2d, Moravians; 3d, Separatists; 4th, Those who declare themselves to have once been Quakers and Moravians, and who state, that, though they have ceased to belong to any of these sects, they continue to have conscientious objections to taking an oath.

Act, § 3.—the interpretation clause. 3 & 4 W. IV. c. 49, by which the privilege was extended to Quakers and Moravians, 3 & 4 W. IV. c. 82, extending it to Separatists, and 1 & 2 Vict. c. 77, applicable to those who have been Quakers or Moravians.

To have been a Separatist will not, it would appear, convey the privilege.

(340.) *Deceased Debtor.*—Where the sequestration sought is of the estate of a deceased debtor, the petitioning creditor must, in his oath, or in a separate oath, specify the place where the debtor resided, or had a dwelling-house, or carried on business, in Scotland, at the time of his death; and whether he was then owner of property, heritable or moveable, in Scotland.

Act, § 12. By § 4, in the case of a deceased debtor, one or other of the three qualities—residence in Scotland, the having a dwelling-house there, or the having a place of business there, must concur with his having had property in Scotland. The statement of any one of these is sufficient; and the act requires the oath to state, not only the general fact, but the locality. It will be well to state, not only the town or county, but in a town the street, and in the county the parish, and any distinctive name which the place may have. In stating that the deceased had heritable or moveable property in Scotland, it is not required by the act, but it will be expedient, to state which of these kinds it was; but any farther particulars regarding it seem uncalled for.

(341.) *Debtor alive but not consenting.*—Where the petition is presented during the lifetime of the debtor, or, when it is for sequestration of a company, and is without the consent of the debtor or company, the petitioning creditor must, in his oath, swear, if he demand sequestration on the ground of notour bankruptcy, that he believes the debtor, or company, to be within one of the classes of persons liable to sequestration, “and he shall specify which description; or that he believes the debtor to have retired and remained within the sanctuary, as herein before provided.”

Act, § 12. It will be observed that, by an oversight in the penning of the act, it is not required that, where sequestration is demanded on the ground of residence in sanctuary, it should be stated that the debtor belonged to any of the classes enumerated as liable to sequestration against their will. By § 7, however, it is necessary that the person should fall within the specification, and it is difficult to see how sequestration can be awarded, in such a case, unless it be on the record that the debtor belongs to one of the classes of persons liable to sequestration. The creditor, therefore, ought to take care not to omit this feature in his oath. In all cases, if the debtor come within the class of persons in the particular enumeration of persons who do not require to seek their living, or a material part thereof, by the trade, it will be best

simply to state the trade in the phraseology of the act. If he belong to the more general class of persons, it will be well to qualify the description with the statement, that he "seeks, or has sought, his living, or a material part thereof," "for himself," or "in partnership with another," or "as agent or factor for others," as the case may be. Where residence in the sanctuary is the ground of the petition, it should be mentioned that it amounted to sixty days within the year; and, as it is a material circumstance, (see p. 284,) it may be well to mention the time when these sixty days expired.

(342.) When the oath is under the clause referred to in par. 312, and to the effect that the bankrupt belongs to one or other of the particularized classes of persons liable to sequestration, the oath must positively state which of them he belongs to; and, if it enumerates more than one of these professions, it must state that he belonged to all so enumerated; and an oath which enumerates two or more alternatively, as "grain merchant or cattle dealer," is insufficient.

Ireland v. Whyte, 24th Nov. 1842, 5 D. 173. Here the expression was "grain dealer, cattle dealer, or potatoe dealer." The former two are among the classes specially enumerated,—not the last. It is clear that it would be equally inept to name a person as belonging to one of the general callings not particularly specified, in this alternative manner,—as, that the bankrupt "has sought his living, or a material part thereof, for himself, or as agent for others, by using the trade of merchandise," &c. It would be necessary to say, positively, whether he acted for himself or as agent, whether he was a partner or a sole trader, &c. The expression, however, as to seeking "his living, or a material part thereof," is intended to be alternative.

(343.) *Creditor in the United Kingdom*.—If the creditor be residing within the united kingdom, his oath must be taken before a sheriff, magistrate, or justice of the peace. When it is taken before a justice of the peace, it is not necessary that he should hold his commission for the county in which the oath is taken.

§ 9. *Turnbull v. Smellie*, 1st March 1828, 6 S. 676. In administering the oath, a magistrate should keep in view that it is contrary to law to allow the oath to apply to any extraneous or collateral circumstances. By 5 & 6 W. IV. c. 62, § 13, every justice of peace, and magistrate, is prohibited from administering an oath "touching any matter or thing whereof such justice, or other person, hath not jurisdiction or cognizance, by some statute

in force at the time being." By 6 Geo. IV. c. 48, § 27, procurators before the inferior courts are prohibited from acting as justices of the peace; and it would not be safe to trust to the validity of an oath certified by such a person.

(344.) *Creditor not in the United Kingdom.*—Where the creditor is out of the united kingdom, 1st, he may make his oath before a magistrate or justice of the peace, "or other person qualified to administer oaths," in the country where he is. He must, however, in such a case, accompany the affidavit with a certificate by a British minister or consul, or by a notary public, to the effect that the person before whom the oath is taken holds the position assigned to him; or, 2d, his known agent in Britain may make an oath of credulity, or of belief on his part, that the debt is due, before a judge, magistrate, &c. as per par. 343.

Act, § 10. The act does not say that the notary public must be admitted to practise according to the laws of the united kingdom and the colonies. It may be a question whether the certificate of a foreign notary would be sufficient.

(345.) *Creditor under Age.*—Where a creditor is under age, an oath of credulity, as above, by his authorized agent, factor, guardian, or manager, will suffice. At the age of fourteen, a creditor becomes qualified to take the oath personally.

§ 10. *Miller v. Aitken*, 13th June 1840, 2 D. 1112.

(346.) *Corporation.*—Where the creditor is a "body corporate," the oath may be made by the "manager, cashier, secretary, clerk, or other principal officer, although he may not be a partner."

Act, § 9. The term a "body corporate," is taken from the phraseology of the English law, where it has a distinct meaning, and is frequently used in reference to the law of Scotland, where its meaning is very doubtful. In England an incorporation is a body which has either been created by letters patent under the great seal, or which possesses what is legally equivalent. It is a feature of such an institution, that it subsists and acts entirely in its corporate name. Its obligations are properly incurred through the corporation seal, not by the signatures of the partners or office-bearers. It is inconsistent with the nature of the institution that any person should be individually liable for its acts. In Scotland we have various kinds of bodies which claim to be incorporations.

Some hold by letters patent, some by long usage, some by authority from other corporations, as by seal of cause. It may be questioned whether the privilege extends to all of these. There is no reason to suppose that it extends to companies under the patent act, 7 Wil. IV. & 1 Vict. c. 73. In practice, the term "principal officer," has been held to apply to any one of the superior officers.

(347.) *Company*.—Where the creditor is a company, a partner may make the oath.

§ 9. In the name of the company, of course.

(348.) Along with his oath, the creditor must produce the accounts and vouchers necessary to prove his debt.

§ 11 & 12. See the nature of these considered in connexion with the qualification for voting. See also below (par. 349) as to the question, how far it is necessary for a creditor, merely concurring, to produce vouchers.

SECT. 3.

A W A R D I N G.

(349.) *Debtor's Consent*.—Where the petition is presented with concurrence, the Lord Ordinary is authorised forthwith to issue a deliverance awarding sequestration, from its date, of the estates which belong, or may thereafter come to the bankrupt down to the date of the discharge, and declaring the same to belong to the creditors for the purpose of the act.

Act, § 13. Of course the award can only be made when the requisites of the statute are complied with. There is no room for inquiry into the foundation of the concurring creditor's debt, but he must produce an oath, and in strict interpretation of the act, the usual vouchers. In § 9 it is enacted, that to entitle a creditor to "petition or *concur*, he must produce an oath;" and in § 11, it is enacted that "the creditor shall produce, *with his said oath*, such accounts and vouchers," &c. From a case decided under the old act, in reference to a qualification to vote for a trustee, *Crawford v. M'Kerrow*, 23d June, 1838, 16 S. 1197, it seems to have been the practice of the Court not to require vouchers from a concurring creditor; and on the bench the distinction was taken, that "It is necessary, by the statute, to produce the grounds of debt before voting for a trustee, whether it be necessary or not to produce them before giving concurrence to a petition for sequestration." Under the old act, however, (see 54 Geo. III. c. 137,

§ 18.) the clause relative to concurring creditors merely requires them to make the oath of verity ; and there is nothing to connect the clause for the production of vouchers with *their* case. It would seem that when vouchers are produced, the Lord Ordinary is bound to notice any invalidity on their face, *e. g.* where a bill is unstamped, or wrong stamped. When there is any such remediable invalidity, it would appear to be the right practice to supersede the petition *hoc statu* till the invalidity be remedied ; A. B., petitioner, 9th July, 1840, 2 D. 1357 ; and see the opinions in Black *v.* Kennedy, 29th June, 1825, 4 S. 124. The date of the interlocutor superseding will be the date from which the sequestration will be counted to have begun if it be afterwards awarded (§ 24.) In those cases where, under the stamp laws, a stamp may validly be appended after the document is used, the court will supersede till the stamp be appended. A bill cannot be stamped after it has been used. If the court overlook illegalities, and award sequestration, it would appear that it will be too late to give efficacy to any remediable objection to the mere form of the vouchers or oath, Robb *v.* Forrest, 9th July, 1830, 8 S. 1035, affirmed, 3d Oct. 1831, 5 W. & S. 740.

(350.) *Without the Debtor's Consent, Citation, &c.*—

When a petition is presented by a creditor for sequestration of the estate of a debtor without his consent, the Lord Ordinary grants warrant to cite him to appear at a specified period. If he be within Scotland, the day fixed for appearance must be not less than six, or more than twenty-one days from the date of citation, which must be accomplished by delivering to him personally, or by leaving at his dwelling-house or place of business, a copy of the petition and warrant. If the debtor be furth of Scotland, the day fixed for his appearance must be not less than thirty, or more than forty days from the date of citation, which must be accomplished by leaving a copy of the petition and warrant at the dwelling-house or place of business last occupied by him, and another at the office of edictal citations. In either case, the warrant charges him to appear and show cause why sequestration should not be awarded. “ The Lord Ordinary shall, if desired, grant diligence to recover evidence of the notour bankruptcy, and of the debtor being within the requisite description, or of his having retired to, and remained within the sanctuary as aforesaid.”

Act, § 15. As to the time within which, after the bankruptcy, &c., the petition may be presented, see above (p. 284.) There is an error of collocation in the sentence above quoted from the

act. What was intended, and is followed in practice is, that whether it be on the ground of notour bankruptcy, or of retiring to the sanctuary, that sequestration is petitioned for, diligence might be demanded to recover evidence of the debtor being within the requisite description. To have accomplished this, the clause should have been worded, "to recover evidence of the debtor being within the requisite description, and of his having been made notour bankrupt, or having retired to, and remained within the sanctuary, as aforesaid." The clause as it stands would indicate, that when sequestration is applied for on the ground of residence in the sanctuary, it is unnecessary to show that the debtor was a commercial man; but, as already shown, in the case of Plock and Logan it was decided otherwise. It may be inferred from that case, and it is understood to be the practice, that the Lord Ordinary, in his discretion, and on the clause which requires that the act "shall be construed in the most beneficial manner for promoting the ends thereby intended," § 3, will grant diligence to recover evidence of a debtor who had been in sanctuary holding a trading character. The matter is, however, rendered more confused by the imperative phraseology of the corresponding clause relative to the awarding, which is, "on production of evidence of the citation, and of the notour bankruptcy, and of the debtor being within the requisite description, or of having retired to, and remained within the sanctuary, as aforesaid, shall award," &c. In the face of this, where no diligence has been prayed for, for evidence that a person liable *qua* residence in sanctuary was within the commercial description, and where, accordingly, none has been produced, would it be competent to refuse to award sequestration on account of no evidence of the trading character being produced?

(351.) On production of the return of the citation, and of the evidence of those facts as to the bankruptcy, &c., for which diligence may be obtained, the Lord Ordinary awards sequestration, at the expiration of the time specified in the warrant: 1st, If the debtor do not appear personally, or by counsel, or by an agent; 2d, If appearing, he do not pay, or produce written evidence of his having paid or satisfied, not only the debts on which he had been made notour bankrupt, or had taken refuge in the sanctuary, but the debts due to the petitioners, and those due to any other creditors, appearing and concurring in the petition; 3d, If he do not show cause why sequestration should not be awarded.

Act, § 15. As to the difficulty in the case of a debtor retiring to the sanctuary, see the remarks attached to par. 350. The debt which the debtor will require to show that he has paid, in the case

of notour bankruptcy, will be measured by the diligence which the petitioner produces in evidence of the bankruptcy. It is more difficult to say what may be accounted the debt, "in respect of which he had retired to and remained within the sanctuary." It would appear, however, that it will not be sufficient for the petitioner merely to prove residence in the sanctuary. It must be shown that the debtor fled thither to avoid the diligence of his creditors; and to prove this, the steps of diligence are the legitimate evidence. When these, then, are produced, the debt which they cover will doubtless be the measure of that which the debtor must prove himself to have paid.

(352.) *Company.* Where the petition is for sequestration of the estates of a company, the warrants and orders are to the same effect as those issued above in the case of individuals, consideration being had in the same manner as to its being with consent of the company, or without consent. It is sufficient personal citation, that a copy of the petition and warrant be left at the place where the business of the company is or was last carried on, provided a partner, or a clerk, or a servant, of the company be there to receive it. Failing this method, citation may be made at the dwelling-house of any of the acting partners, and if none such can be found, by leaving a copy at the office of edictal citations.

Act, § 16. The ground of petition will be the notour bankruptcy of a partner for a company debt. It would appear that the execution of edictal citation ought to bear that an attempt has been made to find the dwelling-house of an acting partner, and has failed.

(353.) In the case of a company, "sequestration may be awarded, either on the application of the company itself, or on the application of a creditor without the consent thereof, of the estates of the company and partners jointly, or of their respective estates separately."

Act, § 16. The object of this clause is not to define the persons who may apply for the sequestration of a company. If it did so, it would be imperfect, as it omits to provide that where the company applies it must be with the requisite concurrence. This is provided for by § 6, as above. The object of the clause is to provide that, whether the petition be with consent or not, the sequestration may apply to the estates of the company and partners jointly, or to their respective estates separately. As to the question what amount of debt will qualify for applying for the sequestration of the individual creditors, see above, p. 282.

(354.) There are two ways in which a company may

give its consent to petition for sequestration : by signing the petition, or by a mandate authorizing the petition, "signed by such company, or those entitled to act for it," being presented with the petition.

Act, § 6. There is here repeated the same dubious phraseology which Professor Bell objected to in the old act, (2 B. C. 674.) It is difficult to say who are "entitled to act" for the company in such a matter, except the individual partners all concurring. The safe method, whether the petition be from the company, or simply have its concurrence, will be to have the petition or mandate signed by all the partners. Professor Bell observes, that "a mandate signed by the firm is questionable, as necessarily it must be written by the hand of a single partner ; and being an act of the most extraordinary administration, extinguishing the very life of the company, it can have no support from the presumed *praepositura*." Where there is a partner abroad, it is presumed that warrant will be granted to cite him unless he has left a mandate to act for him, when the concurrence of his mandatory may suffice. It may be a matter for consideration whether in the case of a company established under letters patent, in terms of the act cited below, the petition or mandate may be signed by one of the officers appointed to sue and be sued, 7 W. IV. and 1 Vict. c. 73, § 5.

(355.) *Deceased Debtor*.—Where the petition is for sequestration of the estate of a deceased debtor, the Lord Ordinary grants warrant to cite his successor. If the successor's residence be known, and be within Scotland, the warrant is to cite him personally or at his dwelling-place. If the successor be furth of Scotland, or if it is not known where he is, there are to be two citations, one at the office of edictal citations, and the other at the place where the debtor had, at the time of his death, his residence, or his place of business, within Scotland. The representative has *induciæ* of twenty-one days to show cause why sequestration should not be awarded. On the expiry of the twenty-one days, and the production of an execution of citation, if no appearance have been made, the Lord Ordinary is to order intimation of the warrant in the Edinburgh Gazette, giving the successor a farther period of twenty-one days from the date of the publication, within which he may object. If he then do not appear, "or if appearing, no cause be shown by him or any party interested, sequestration is awarded."

Act, § 14. But, unless in the circumstances above described, which

admit of the awarding at an earlier date, it must lie over till the expiry of six months from the date of the deceased's death, (p. 277.) The sequestration of a deceased debtor's estate, being a new feature in the law, no analogies as to the proper practice can be taken from that under the old act. The character of a representative must be held as distinguished from that of a creditor; and thus it would appear that every person having an interest in the deceased's estate, which is not that of a creditor, should be cited, either in his own person or through the executor of a will, who will be his representative if he be a legatee. Heirs to heritage, whether by law or provision, next of kin, and executors, seem all entitled to citation. In the interpretation clause, (§ 3,) the word successors is described as including "heirs, heirs apparent, representatives by deed or otherwise, executors, and nearest of kin; and also assignees, and singular successors, where they have acquired the right." When there is a trust settlement the trustees should be cited. It will be observed that the *induciae* are the same whether the successor be in or out of Scotland.

In connexion with the sequestration of a deceased debtor's estates, there is a provision for granting diligence to recover evidence of the deceased having resided or had a dwelling-house or carried on business in Scotland at the time of his death, or having been owner of property in Scotland, or having been notour bankrupt, or in the sanctuary. See par. 358.

(356.) *Opposition.*—There are two sets of cases in which appearance may be made, and cause shown against the awarding of sequestration: 1st, When the application is for the sequestration of a debtor or company without consent, when the debtor or company may appear; 2d, When it is for sequestration of the estate of a deceased debtor, appearance may be made and cause shown by the debtor's successor, "or any party interested."

Act, §§ 14, 15. These cases are thus distinct from that where a debtor petitions or grants a mandate, and the grounds on which the court may refuse are correspondingly different. It would appear, as above stated, that in the case of consent, the court is bound to award the sequestration, if *ex facie* the proceedings are regular according to the statute, and there is no invalidity apparent on the face of the documents produced. It appears that in such a case there is no party who has a title to appear and oppose the awarding. In the case of *Thomson v. Broom*, 24th Feb. 1827, 6 S. 468, in reference to the same department of the old act, it was held that the court was bound to award the sequestration, "unless the party applying for it did not fall within the description of persons entitled thereto, or had not the concurrence required by the statute." But if the application with the affidavit,

&c. be in form, and it appear on their face that the debtor is within the description, and that there is the necessary concurrence, it may be questioned whether defects in these respects can be alleged by opposing parties, and proved by extraneous evidence. In the cases above specified, however, appearance may be made, and it is to be regretted that there are no means of coming at a distinct view of the pleas which will justify refusal. There are grounds for holding that there is one set of pleas which will justify refusal to award, and another which will only be a ground for recall. See the case of Thomson above. In relation to the old act, where the awarding was to take place, unless "reasonable cause" were shown against it, Professor Bell remarks, "it seems relevant to stop the proceedings, if the court shall be satisfied that there is no insolvency,—that the debtor's means are ample for answering all his debts, exclusively of any speculative or problematical advantages, the risk of which creditors are not bound to undertake or abide." (2 B. C. 326.) It would seem that, wherever it is disputed that any one of the requisites of the act has been fulfilled; wherever, for instance, the validity of the bankruptcy is impugned, or it is denied that the party comes within the class of persons liable to sequestration, or the genuineness of the petitioning creditor's debt is questioned on grounds apparent on his oath and vouchers, such an objection may be pleaded in bar of sequestration. On the other hand, where the requisites of the act are *ex facie* complied with, objections may be presumed which can only be pleaded in an application for recall. In the case under the old act of Lockie v. Mason, 14th Feb. 1837, 15 S. 547, the persons who petitioned for the bankrupt's sequestration had acceded to a trust-deed, but under the condition that he should make "such a statement of his affairs as the creditors deem proper." The trustees had been infest in the bankrupt's heritage, and had taken possession of his moveables, and sold part of them. The petitioners maintained that the explanation by the bankrupt was not "such as they deemed proper." The trust had not received the accession of all the creditors. The objections to the awarding were overruled, but it seemed to be the opinion of the judges, that if the whole creditors had unconditionally acceded, the decision would have been otherwise, and no remarks were made on the question, whether these insufficient grounds of objection would have been sufficient grounds of recall. There is another circumstance in which there are grounds for believing that there is a difference between a refusal to award, and a recall. It is specially enacted, (§ 21,) that a creditor may petition for recall, but it is doubtful if a creditor may oppose the granting of sequestration. In the case of Cheyne v. Walker, 26th Nov. 1828, 7 S. 60, Lord Gillies remarked, "It is made competent to a creditor to apply for a recall, but there is no power given to him to oppose the sequestration. If it had been intended that a creditor should have been entitled to oppose it, this would have been allowed in express language,

but it is not so." But, on the other hand, the Lord President (Hope) observed, "I rather think a creditor may oppose the sequestration being awarded, because it appears somewhat inconsistent that he should not be allowed to oppose that being done, which he may the next day insist on being undone."

(357.) *Appointment of Meetings and other Incidents of the Awarding.*—In the deliverance awarding sequestration against the estate of a debtor alive, the Lord Ordinary fixes the times for meetings of the creditors, to be held to appoint an interim-factor and trustee, in each instance fixing the day and the hour. The meeting for election of interim-factor must be fixed for some day not earlier than eight, and not later than fourteen from the date of the deliverance, and must be appointed to be held "at a convenient place, within the county where the debtor carries on, or last carried on his business, failing which, at a convenient place within the county where he resides, or last resided." The meeting to elect a trustee or trustees in succession, and commissioners, must be fixed for some day not less than four weeks or more than six weeks from the date of the deliverance, and must be appointed to be held at the place assigned for the meeting to elect the interim-factor. He then remits the process to the sheriff of the county where these meetings are appointed to be held. He also grants to the debtor, or to the partners of the company, as the case may be, a protection from arrestment or imprisonment for civil debt until the meeting for electing the trustee.

Act, § 13. See below as to the holding of the meetings, the procedure in relation to the election of interim-factor and trustee, the granting and renewal of personal protection, &c.

(358.) In the case of a deceased debtor, the orders are to be the same, "so far as circumstances will permit." Personal protection is of course uncalled for in such a case. In addition to the orders applicable to other cases the Lord Ordinary is to "ordain any successor who has made up a title to, or is in possession of, the estate of the debtor, to transfer such estate, as far as liable for the debts of the deceased, to the trustee to be appointed."

Act, § 14. The reservation, "so far as circumstances will permit," would probably allow a considerable license in fixing the place for holding the meetings. After the clause in the act, immediately above

quoted, and in conjunction with the awarding of the sequestration, there is this provision, "and, if desired, the Lord Ordinary shall grant diligence to recover evidence to show that the debtor resided, or had a dwelling-house, or carried on business in Scotland, at the time of his death, and was then the owner of heritable or moveable estates in Scotland, and was notour bankrupt, or had retired to and remained in sanctuary, as herein before mentioned." It was certainly intended that the diligence should be granted, as a means of providing proof before the awarding, and at the time of granting warrant to cite, and in practice it is so granted.

SECT. 4.

R E C A L L .

(359.) The deliverance of the Lord Ordinary awarding sequestration is not subject to review by the Inner House, but it is liable to recall.

Act, § 21. under the old act, in a case where a debtor lodged a "reclaiming note or petition," containing an alternative prayer to review and alter the Lord Ordinary's judgment, or to appoint the application to be served and answered as a petition for recall, the court entertained the latter prayer, *Bellis, &c. v. M'Gregor*, 3d Dec. 1831, 10 S. 96.

(360.) *Who may apply within limited time.*—The right to petition for recall is limited to a certain time, unless in the case of an application by nine-tenths, as below. In the case of the following parties, the right to petition can only be exercised within forty days after sequestration has been awarded, viz. 1st, Any debtor whose estate has been sequestrated without his consent; 2d, "The successors of any deceased debtor whose estate has been sequestrated as aforesaid;" 3d, Any creditor, whether the sequestration has been awarded with the consent of the debtor or his representative, or not. In the case of the sequestration of the estate of a deceased debtor, whose successor has been edictally cited, the successor, "or any person having interest," may petition at any time before the publication of the advertisement for payment of the first dividend.

Act, § 21. From the context of the clause as to the privilege of the successor, who may petition only within the forty days, it is to

be collected that a successor who consents is excluded, because in the immediately following sentence it is declared, that a *creditor* may petition whether the debtor or his *successor* has consented to the sequestration or not. It does not appear, therefore, that the successor is excluded from petitioning for recall by the circumstance of the sequestration having been awarded in consequence of a mandate to apply for it having been left by the deceased debtor, as above, (p. 277.) There seems to be nothing in the act to prevent a petitioning or concurring creditor from petitioning for recall on grounds which he was not aware of when he petitioned or concurred.

These clauses, authorizing creditors to apply for recall, must be construed along with those which define the classes of creditors who may act, and will, it may be presumed, include those who might have joined in an application for sequestration, as above, (p. 279 *et seq.*) and those who may vote. A party was held not entitled to petition for recall who founded his character on a decree for expenses, not issued in his own name, but in that of his agent, who had done diligence on it, *Black v. Kennedy*, 29th June 1825, 4 S. 124. The qualification of the creditor who may petition for recall must *ex facie* be of the same character, (apart, of course, from the amount,) with that of the petitioner who applies for sequestration. It may be questioned, however, whether the same strict inquiry would be allowed in the former case as in the latter. Supposing that a creditor who has lodged his claim, affidavit, and vouchers, in proper form, petitions for recall, on the ground that the debt of the creditor who petitioned for the sequestration was illegal, would it be a plea in bar to maintain that the debt of the petitioner for recall was equally unfounded? or, would that petitioner, on the ground of the formality of his claim, affidavits, and vouchers, be authorised to try the question of the validity of the sequestration? On grounds of expediency, there are many reasons for holding, that the debt on which sequestration may proceed should be more strictly open to examination than that which merely gives an interest for trying its validity. That the petitioner's debt is illegal, or otherwise unfounded, is undoubtedly one of the grounds on which sequestration may be resisted, under the permission to "show cause why sequestration should not be awarded."

(361.) *Intimation and Judgment.*—The petition must set forth reasons for recall. The Lord Ordinary orders a copy of the petition and his deliverance to be served on each petitioning creditor, or on the petitioning debtor and concurring creditor, as the case may be, or on the known agent of such parties, and on the interim factor, or the trustee, if such have been appointed, requiring them to answer within a specified short time, ordering a notice of

the presenting of the petition to be published in the Edinburgh Gazette. On the expiration of the time fixed, the Lord Ordinary proceeds to pronounce judgment. If he recall the sequestration, the recall is to be entered in the register of sequestrations and on the margin of the register of inhibitions. Until the sequestration be recalled, proceedings go on as if no petition had been presented.

Act, § 21. Professor Bell, in connexion with the intimation of the petition to parties, says, "It should also be intimated to all the creditors, though no provision to this effect is made in the statute, [and the same remark applies to the present statute,] for the sequestration may have been a fraud, intended to mislead the creditors; and the recall of it may render effectual preferences, which an effectual sequestration would have destroyed;" (2 B. C. 331.) The terms of the act, as to the proceedings going on as if no petition for recall had been presented, are, "and until the sequestration be finally recalled," &c. Is it to be inferred from this, that until the reclaiming days have expired without a reclaiming petition, or until a decision of the Inner House on a reclaiming petition, the sequestration is to be carried on? The old act contains a like clause, but it does not appear to have been the subject of any decision.

Under the old act, it was held that a petition for recall of sequestration having been granted, and, on a reclaiming against the Lord Ordinary's interlocutor, the petitioner having withdrawn his appearance, that appearance might be made by another creditor, *Balmerino v. Graham's Trustee*, 15th Nov. 1823, 2 S. 493.

(362.) *Application by nine-tenths.*—At any time during the progress of the sequestration, nine-tenths in number and value of the creditors ranked may apply for recall, by petition, to the Lord Ordinary. The Lord Ordinary, in such a case, orders notice of his deliverance to be published in the Edinburgh Gazette, requiring all concerned to appear within fourteen days after the date of publication, to show cause why recall should not be pronounced. On expiration of the term, he is to proceed to judgment, and, in the meantime, as above, the proceedings of the sequestration are to go on. There is no other means by which a sequestration can be recalled after the times respectively above specified.

Act, § 22. Under the old act, a practice had been established, although there was no express provision in the act to authorize it, of allowing recall after the statutory time within which a creditor might petition had expired, if all the creditors who had lodged claims joined in the application, along with the bankrupt himself.

(See 2 B. C. 331.) The special and distinct terms of the clauses above set forth, will stand in the place of any such practice arising out of the new act.

In one respect, a stricter criterion seems to be applicable to the qualification for so petitioning, than to that for petitioning within the forty days. The creditors are defined as those who are "ranked;" and, consequently, any creditor whose claim has been rejected is excluded, and any one whose claim is partially admitted can vote only to the extent of the admission.

(363.) It will be a good ground of recall that any of the statutory requisites of awarding, such as bankruptcy, the retirement to the sanctuary, the requisite lapse of time between the circumstance on which the awarding is founded and the awarding, &c., can be shown not to have existed.

Under the old act, there were certain grounds stated, "that the party against whom [the sequestration] is awarded, does not come within the description before given, or falls under any of the exceptions therefrom, or that there is any other good ground for recalling the sequestration," &c. (54 G. III. c. 137, § 22;) but, in the late act, it seems to have been considered sufficient to rest on the directive clauses of the act, which requiring a certain concurrence of circumstances as a ground for legally awarding sequestration, make it an illegal sequestration where any of these is wanting.

If there can be no cause shown on the merits, it does not appear that the judicial sanction of an informality which should have been a ground for delaying the awarding until it was rectified, would be a ground of recall, *e. g.* where the court has allowed an unstamped or misstamped document to appear as a voucher; see above, p. 290, and the case of *Robb v. Forrest*, there cited.

The ground of recall may be, an objection to the petitioning creditor and his debt, as above, or an objection on the ground of the debtor not being liable. In *Fulton v. Forbes*, 9th July 1816, there was a recall because (as reported F. C.) the petitioner did not state on his oath the fact of his being trustee for other creditors. In *Ogilvie v. Robertson*, 29th May 1824, 3 S. 86, there was a recall because the bankrupt, being sequestered as a horse-dealer, was found not to have a licence. (See above, p. 270.)

Nice questions may occur where the requisites of the act really have taken place, though not in the manner stated. As, where the debtor was a person liable to sequestration under the act, but did not come within the denomination stated in the petition; or where he really was bankrupt, while the particular diligence on which he was sequestered is inept. Professor Bell draws this distinction:—"If the objection is to the *diligence*, another creditor

producing unobjectionable diligence, subsisting against the bankrupt at the date of the sequestration, will save the sequestration from recall. When the objection is to the *debt* of the petitioning creditor, it will not be enough that another creditor is willing to concur after the objection is raised." He continues, "If a creditor sufficiently qualified, however, should suspect foul play, he may concur in the sequestration; and such concurrence will, as from the date of that concurrence, support the sequestration against any objection to the debt of the petitioning creditor." (2 B. C. 333.) Where the debt was *ex facie* contingent, the debtor being but the indorser of a bill accepted by another person, sequestration was recalled; and the plea that from the insolvency of the acceptor, it was virtually an existing debt, was not listened to. *Morrison v. Turnbull*, 28th Jan. 1832, 10 S. 259. In *Hunter v. Mitchell*, 10th July 1834, 12 S. 917, the ground of application for recall being, that the concurring creditor was not a true creditor to the extent required by law, the court, of consent, remitted to the assistant clerk to report, and, on his report, refused to recall.

In considering the grounds pleaded for the recall of a sequestration, which is generally the first form in which the merits of the proceeding can be fully discussed, the various reasons that can be stated for support or for recall will have to be considered in conjunction with the shapes in which the statute may be misapplied. As already remarked, the first steps may be taken with an intentional flaw in them, in order that, while the creditors suppose a sequestration is in progress, there may be none, and preferences which a genuine sequestration would level may be preserved. On the other hand, a person not belonging to the class for whom the sequestration act was intended, may endeavour to defeat the just preferences of his creditors by bringing himself within the act, or a fictitious and "confident" creditor may have recourse to it to the prejudice of the creditors who have done diligence. The court must look to the genuineness of the alleged circumstances bringing the debtor within the act, and also to the genuineness of the creditor's claim, and where there is palpable fraud, there must be a recall. Thus, in *Wood v. Thomson*, 29th Jan. 1831, 9 S. 351, the debtor's brother had concurred with him in obtaining sequestration on a promissory note for £146, 10s. The note was by a third party in favour of the debtor, and had been dishonoured. It was said that the brother had paid it, but there was no protest against the payee, and though the maker was imprisoned, the letters of caption were for a debt of only £50. In a list of debts on the occasion of a private trust, the debtor had not entered the debt to his brother. The sequestration was recalled.

(364.) The failure to follow up the awarding with the proper statutory notices, or to perform accurately

any of those farther proceedings in the sequestration which constitute the duty of the petitioning creditor or others, will not be a ground for recalling the sequestration, which, when once awarded, if it has been properly awarded, creates a *jus quæsitum* in favour of the creditors at large, who are benefited by it, not to be affected by the subsequent acts or omissions of individuals.

Gray v. Cockburn, 2d Feb. 1844, 6 D. 569. The case was one of a mere verbal blunder, but it gave an opportunity for settling this broad question. The christian name "Alexander," instead of "James," had been inserted in the notice in the Edinburgh Gazette, (see below, Ch. IV. § 1.) There was an attempt to remedy the error, but the question was considered on the ground of the notice being vitiated, and equivalent to none. The case was laid, on minutes of debate, before the whole court. A minority were of opinion that the omission vitiated the sequestration, and that it ought to be recalled; but the majority, on the principle that after sequestration is awarded, if it have been rightly awarded, there is a judicial appropriation of the estate to the creditors as a body, which cannot be defeated by the omission or misconduct of an individual, held that whatever might be the remedy which they should afford in the circumstances, it could not be a recall. The application for recall was by a creditor whose preference was destroyed by the awarding; and thus the question was thrown upon the merits of the right which the creditors at large have to protect what they may gain by the awarding. It was, as a counterpart, held that whatever nullities may be created by omissions or improper proceedings, must be of the matters that follow, and not of the matters that precede the defect. In the opinion given by Lord Murray, which was that followed by the majority of the court, the effect that any recall on account of omission to comply with statutory directions might have on the general administration of the statute, is thus laid down:—

"The statute is, from its nature, and its provisions, entitled to the most favourable construction, and the legislature has farther expressly declared, 'That this act shall be construed in the most beneficial manner for promoting the ends hereby intended.' Here a rule of construction is authoritatively enjoined by the legislature.

"A statute containing so many special enactments, must, according to the ordinary course of human affairs, give rise to some omissions in the observance of the rules laid down, arising from mistakes or accidents. If all departures from any part of the procedure enjoined by the statute shall be held fatal to every thing that has preceded, as well as to every thing that might follow, the blunder or accident, then a rule of construction will be established, directly opposite to that which is authori-

tatively enjoined by the legislature, and perhaps equally so to that which the former statute received in practice. We believe that if an inquiry was made, it would be found, that where errors were perceived, the course followed was to substitute correct procedure for that which was erroneous, either by having sequestration awarded of new, or, where the error was committed in a later stage of the proceedings, by substituting others for them; such proceedings, we admit, have not the authority of decisions, because they passed *ex parte*, and without discussion."

On the special effects which a recall, on the ground of the mistake under consideration, might have in defeating the creditors, as a body, it was observed, "It is important to keep in view, that this clause of the statute, directing advertisements, is not confined to the case immediately before the court, of a sequestration applied for by a debtor with concurrence of creditors, but applies equally to all the other cases of sequestration under the act, whereby sequestrations opposed by the debtor or by a company, or sequestrations of the estates of deceased debtors, may be awarded. The judgment pronounced by the court in this case, will, therefore, be equally applicable to a failure of advertisement in any one of these cases.

"A party who was in the course of obtaining preferences which a sequestration would cut down, might disarm the vigilance of other creditors, by initiating a sequestration, and by the subsequent blunder of a Christian name, make every thing previously done null, when the creditors would have no redress but by carrying on the sequestration. In the case immediately before the court, of an application for sequestration by a debtor, with the requisite concurrence, the award of sequestration may take place immediately; but the 23d section evidently contemplates, that opposition may be made even by a creditor; and, in various cases, that opposition may be protracted.

"It is even possible, though no way a probable case, that the opposition may be carried on in this court, and in the House of Lords, before the sequestration is awarded; at any rate, an interval, greater or less, may take place between the first deliverance in the sequestration and the award of sequestration. During that period all preferences are suspended, though no advertisements can possibly take place before the award of sequestration. Without going farther than the section quoted, and other sections which shall afterwards be adverted to, the abbreviate recorded on the second lawful day after the first deliverance, would then operate as an inhibition and citation in an adjudication, during that period, without any advertisement.

"These are positive enactments, and dispose of matters independent of the advertisements, which are afterwards ordered in the same section. If so, on what principle can they be held to depend on the advertisements which shall afterwards be made? There is a provision, that if the abbreviate shall not be recorded, it shall not have the effect of an adjudication of the estate of the

debtor. But there is no authority for adding to these provisions, so clear and so absolute, that the abbreviate, duly recorded in terms of the statute, shall have no effect unless a subsequent provision for advertisement in the London Gazette is complied with. The statute might have contained nothing but these enactments, and they would, as expressed, be independent, and have been effectual to a certain extent."

(365.) *Expediency*.—It will not be a sufficient ground for granting recall at the suit of individual parties within the forty days, that it will be expedient to do so, and that the affairs of the bankruptcy may be better managed in some other form.

Kid v. Rose, 12th Feb. 1830, 8 S. 510; see *Broughton v. Dickson*, 2d July 1812, F. C. Although there should be no appearance to defend the sequestration, it does not appear that the court will grant recall, unless a legal ground be stated as above, for the creditors are not parties, and unless as against those who unsuccessfully oppose it, a decree of recall is not *res judicata*, *Douglas*, 15th Feb 1812, 2 B. C. 334.

Where the recall, however, is applied for, in proper form, by nine-tenths of the creditors, as the directions of the act are, not that the applicant shall show cause why there should be a recall, but that parties concerned shall "show cause why the sequestration should not be recalled," it seems to be the rule that preponderating consent shall, in that case, be sufficient ground for the awarding, unless special reason against it be shown. The application by nine-tenths seems, in this respect, to come in the place of the former practice, by which the court used to allow recall where the bankrupt and trustee applied, with concurrence of all the creditors who had claimed, 2 B. C. 331, 332; *Jamieson & others* petitioners, 21st Dec. 1822, 2 S. 105; *Kirkland* petitioner, 8th July 1836, 14 S. 1118; *Lothian* petitioner, 22d Jan, 1839, 1 D. 401, where a composition was agreed to by all the creditors who could be discovered, and there was no opposition.

(366.) No ground of recall, however strong, such as, that the sequestration was applied for by mistake, will sanction a recall, applied for in any other manner than that directed by the act.

Taylor v. Kerr, 27th May 1826, 4 S. 625, where the petitioning creditor, who was abroad, said he had acted in total ignorance of the nature of a sequestration, and the petition for recall was supported by a majority of the creditors. This was under the old act; but the principle is equally applicable to the new.

(367.) *Effects of Recall.*—The interlocutor, by simply “recalling” the sequestration, restores to their validity whatever preferences were struck at, and the sequestration ceases to be equivalent to an inhibition, or to a diligence in any shape.

These qualifications being created by statute, as concomitants of a sequestration, lapse when it is annulled. By the interlocutor, all farther proceedings are discharged and prohibited. The recall is ordained to be registered in the register of sequestrations, and warrant is given to purge the register of inhibitions of the sequestration as an inhibition, by ordaining the keeper to enter the recall on the margin. The interim factor or trustee may be ordained to deliver any funds realized by him to the petitioner, or the person having right thereto. Where there are purchasers of any part of the bankrupt estates, or other third parties have an interest, it would seem that it may be attended to. (See 2 B. C. 334.) It is not usual for the interlocutor to annul the whole proceedings; and it is specially provided, in § 26, that recall shall not nullify the interruption of prescription constituted by petitioning, concurring, or claiming.

CHAPTER III.

EFFECT OF THE SEQUESTRATION IN ATTACHING THE PROPERTY AND RIGHTS OF THE BANKRUPT.

SECT. 1. DATE OF THE VESTING.

(368.) The date of the sequestration is the date of the first deliverance by the Lord Ordinary on the petition. In those cases, then, where the Lord Ordinary, in the first place, appoints citations or intimations, or postpones consideration till some irregularity be rectified (par. 333) the date of such his first interlocutor becomes the date of the sequestration if it be afterwards awarded. Whatever rights, therefore, the decree of sequestration carries, are carried from that date.

§ 24. See the effects of this rule considered in connexion with the operation of the sequestration as a diligence, and as a vesting of the estate, in the following sections.

SECT. 2

SEQUESTRATION AS A DILIGENCE.

(369.) The sequestration renders the debtor, or company, notour bankrupt from its date, without prejudice to any previous bankruptcy. To bring this bankruptcy to a uniformity with the other forms, all rights on which infetment may follow, are to be held as of the date of the registration of the sasine, and all transferences and securities which do not require sasine, but which require intimation or delivery to render them complete, are to be held as of the date of such intimation or delivery.

§ 25. See on the effect of bankruptcy, Book III. This provision so far as respects bankruptcy by virtue of the sequestration, has, of course, no reference to the case of a deceased debtor's estate. But see par. 383.

(370.) *Arrestment and Poinning*.—The sequestration is declared to be, from its date, equivalent to an arrestment in execution and a decree of forthcoming, and also to an executed or completed poinning. In this respect it retroacts, so as not only to sweep away all arrestments or poinnings by individual creditors, subsequent to the date of the sequestration, but likewise those “on or after the sixtieth day prior to the sequestration.” The funds or effects affected by such null diligence, or their proceeds, if sold, must be made forthcoming to the trustee.

Act, § 83. For the method of calculating the sixty days, see the discussion of the rule under the act 1696, p. 208. The expression here used differs from that of the act 1696. In this clause, moreover, the words are, “on or after the sixtieth day prior to the sequestration,” while, in § 95, applicable to actions of mails and duties, and poinnings of the ground, the words are, that nothing shall be available, unless it be done “at least sixty days before the date of the sequestration.” Both these forms of expression, however, admit of the application of the rule applied to the act 1696, and the arrangements for equalising diligences, and wherever the period, sixty days, is used in the law of Scotland, the rule of calculation confirmed in the case of Scott, must be held to apply. With the civilians, the principle of *dies inceptus pro completo habetur*, seems to have been held only where it tended to an equitable application of the law (Voet at Pand. XLIV. 3 ;) but, as practised in Scotland, it must now be held as a strict rule. For the effects of the equalisation of diligence, see as to arrest-

ment, p. 96, and as to poinding, p. 102. It does not seem to have been intended that this provision could be made applicable in the case of the sequestration of the estates of a deceased person. See, in the ensuing section, p. 315. the vesting in the trustee of alienations and diligences within a certain period anterior to the decease.

(371.) As all arrestments and all poindings used within sixty days before notour bankruptcy, and within four calendar months after it, rank *pari passu*; and as a petition for sequestration, without consent, must be presented within four months after notour bankruptcy, such sequestration will have the effect of equalising, and sweeping into one general diligence for the benefit of the creditors at large, all arrestments and poindings used on any day subsequently to the sixty-first day before that on which the debtor was made notour bankrupt.

Act, § 8, as construed with 54 Geo. III. c. 137, §§ 2, 5. This is a material amendment on the old act, by which, instead of the sequestration being an arrestment, it was merely enacted, § 40, "That no arrestment of the bankrupt's effects, used at any time within sixty days before the date of the first deliverance on the petition for sequestration, shall give a preference to the arresting creditor, in the event of sequestration taking place, but that, in every such case, the effects arrested shall be made forthcoming to the trustee," &c. In interpreting the like clause, in the previous act of 33 Geo. III. c. 74, the court were obliged, unwillingly, to decide, that "The act awarding sequestration on the first deliverance on the petition for sequestration, cannot be held as an arrestment in the question with arresters whose diligences were used sixty days, or more, before the sequestration." *M'Geachy & Others v. Johnston's Creditors*, 2d March 1808, 2 B. C. 79. The principle was afterwards confirmed under the 54 Geo. III. c. 137. *Macewan v. Young*, 27th March 1817, F. C.

It was formerly held, that when an act creating notour bankruptcy had once occurred, the sequestration must be applied for within the statutory time thereafter, and that the period could not recommence by a second making notour bankrupt, the bankruptcy being a status which, once constituted, could not be reconstituted, unless there were intervening solvency. In *Balfour v. Pedie*, 20th Feb. 1841, 3 D. 612, it was, however, found, that this doctrine does not apply to the new act, and that, when there has been an act of notour bankruptcy within the four months preceding the application, there is nothing in any preceding bankruptcy to bar the awarding. The bearing of this rule on the present subject would appear to be as follows: If the bankruptcies have succeeded each other in such a manner, that, counting the sequestration as one of them, the four months following on any one of them has not expired before the commencement of the

sixty days preceding another, the sequestration will sweep up all the diligences used within sixty days of the first bankruptcy; but that if there be any hiatus in the succession, the sequestration cannot affect diligences anterior to it. If this should be found to be the law, it may be possible that the clause obliging arresters and pinders to refund to the trustee, may have a retroaction for a considerable period.

(372.) The trustee does not require to have a loosing of the arrestment to get goods taken out of the nexus of an arrestment. The awarding is executed diligence, authorising him to take possession of the bankrupt's effects in all quarters; and where he is resisted, or an opposition right is set up against him, he may apply to the judge ordinary.

Allan & Son v. Fyfe, 28th Nov. 1835, 14 S. 80. Here the trustee applied to arresting creditors to loose their arrestments, that perishable articles might be sold, and they refused to do so, except on their own terms. It seemed to be the general opinion on the bench, that the trustee had adopted a wrong method. The Lord President said, "Had the trustee applied to the Sheriff, he must have got immediate access to the goods;" and Lord Mackenzie said, "So far from the trustee desiring to have the arrestments loosed, I think he should have desired them to stand good for the benefit of all concerned. If they were loosed, the subjects arrested might be exposed, perhaps, to hazard of different sorts, whereas the benefit of the diligence just accrues to the bankrupt estate, if it be not loosed. Besides, it might raise a question, if a creditor consented to loose his arrestment, whether he did not thereby forfeit the benefit of the provision regarding his expenses." This is said in relation to the expression, "*deprived* of the benefit," &c. see below.

(373.) It is provided "that the arrester or pinder, before the date of the sequestration, who shall be thus deprived of the benefit of his diligence, shall have preference out of such funds or effects for the expense *bonâ fide* incurred by him in such diligence."

Act, § 83. It was found, in interpreting the equivalent clause in the old act, that an arrester within the equalising period was not bound to loose his arrestment at the demand of the trustee, and was justified in refusing to do so unless on his own terms—immediate payment of the expenses. (Allan & Son, as above.) The completers, or "users," as they are termed, of diligence equalised on account of notour bankruptcy, and brought within the sweep of the sequestration, have a like clause for the refunding of their expenses, which will have to be interpreted with the above. 54 Geo. III. c. 137, § 2.

(374.) *Poining of the Ground, and Decree of Mails and Duties.*—The sequestration, as a diligence, is preferable to that of the holders of real securities, against the moveables on the land, and the rents, unless in so far as their diligence covers the interest of the debt for the current term, or for one year immediately preceding the commencement of that term. Subject to this exception, no poining of the ground which has not been carried into execution by sale sixty days before the date of the sequestration; and no decree of mails and duties on which a charge has not been given sixty days before that date, is available in competition with the sequestration.

Act, § 95. See the exception in the case of interest, noticed below, in connexion with the claims of preferable creditors. According to the literal terms of the clause, no poining of the ground or decree of mails and duties within the prescribed period is good; but § 79 of the act, preserving the rights of the superior, the restriction can apply only to the holders of heritable securities.

There is in this clause no provision corresponding to that in § 83, which makes the proceeds of an arrestment or personal poining after the sixtieth day before the bankruptcy, forthcoming to the trustee; but as any proceeding in contravention is declared not to be "available," there can be no doubt that funds realized within the sixty days may be recovered.

The want of a similar provision in the old act occasioned some decisions contrary to the spirit of the bankrupt law. In *Campbell v. Paul*, 13th Jan. 1835, 13 S. 237, an heritable creditor infert, having—after sequestration was awarded, but before the trustee was confirmed—raised and executed a poining of the ground, obtained warrant of sequestration of crop and stocking, in security of the principal and interest of the sum secured. It was found that, on the lands not being sufficient, when sold, to meet the debt, there was a real preference over the moveables. See *Tullis v. Whyte*, 18th June 1817, F. C. and *Bell v. Cadell*, 3d Dec. 1831, 10 S. 100, where decree of poining being obtained before sequestration, execution was proceeded in after the awarding. See also *Kinnear v. Watson*, 17th June 1832, 11 S. 46.

(375.) *Landlord's Hypothec.*—The landlord's hypothec is not affected by the sequestration act.

§ 96. See the nature and operation of this right above, p. 69.

(376.) *Adjudication.*—The sequestration is an adjudication of the debtor's heritable estate from its date, for

payment of the whole debts, principal and interest, as accumulated at that date. When it comes within year and day of "any effectual adjudication," the estate attached thereby is brought within the sequestration.

Act, § 82. See as to the ranking of adjudications within year and day of the first effectual, p. 78, *et seq.* It will be observed, that it is not merely the first effectual, but *any* effectual adjudication within year and day before its date, that the sequestration carries. This will bring into the sequestration any isolated adjudication that may be completed, as well as any first effectual with its conjoined adjudications. It will be observed, that by § 20, the registration of the abbreviate after the first deliverance, independently of the awarding, has the effect of an inhibition, or of a citation in an adjudication, which will be efficacious if the awarding should be delayed. If the provisions regarding the equalisation of diligence against moveables should be found to apply to the sequestration of a deceased person's estate, this provision regarding adjudication may, it would seem, also apply. See above, par. 370, and Commentary.

(377.) *Crown's Extent.*—There is no mention of the crown's extent among the diligences which have to be equalised; and it would therefore appear that an extent will not be defeated by the retroaction of the awarding to the date of the first deliverance.

Professor Bell holds, (Com. on the recent Acts, p. 49) that "The trustee will not be entitled to a preference over the crown's right, unless the sequestration be actually awarded previous to the fiat." See this matter discussed in connexion with the law of extent, p. 92. The old act not vesting the estate until the adjudication to the trustee, the decisions on it can furnish no precedents on this point.

Under that act a remarkable case occurred of the imperative character of the rule, that the crown's extent carried all before it, up to the moment of the adjudication to the trustee. On a motion for confirmation of a trustee, and adjudication, appearance was made by the crown counsel, who, without intimation to the petitioner's agent, craved that the petition might be superseded till next day; and, in the absence of the petitioner, the court acceded. Afterwards, and before the interlocutor was signed, it was represented that the object of the postponement was to have a writ of extent issued; but, in absence of the crown counsel, the court refused to go back on the matter. In the mean time a writ was issued. It was craved that there should be inserted in the interlocutor awarding confirmation a clause giving effect to it as if it had been issued the day before; but this was refused. *Tipper v. the King*, 22d May 1830, 8 S. 785.

Questions with Foreign Diligence.

(378.) A curious question was suggested in the opinions in the case of *Lindsay v. Paterson*, 10th July 1840, 2 D. 1373, (see below, p. 315,) how far the rules as to the equalisation of diligence would apply to those methods of execution in other countries which correspond with arrestment and poinding as per § 83 of the act? In this case the creditor had sued out in the court of the Lord Mayor of London a declaration, as a step in a foreign recovery, against a partner of Coutts & Co. as the depositary of money of the bankrupt. Passing from the discussion of the main principle on which the case was decided, Lord Gillies observed, "I would observe farther, though I do not rest my opinion on it, that the attachment would seem to be struck at by the retrospective effect of the statute, § 83, as it was within sixty days of the sequestration. The respondent has, indeed, pleaded that the statute is limited to arrestments, and that an attachment is not reached by it. But I consider that plea to be totally unfounded. The one is an English, and the other is a Scotch term; but the thing designated is equally struck at by the statute, whether it is attempted in England or in Scotland. If a Latin term of the same signification had been used, the statute would not thereby have been impaired in its operation, provided that the thing so designated was clearly understood."

The process of foreign attachment happens to bear a remarkable resemblance to that of arrestment in execution. It arose from custom, in commercial places, like our act of warding, as a special remedy for the recovery of debts from strangers. It is known within the city of London (where it proceeds before the Lord Mayor or the Sheriff), in Bristol, Exeter, Lancaster, and some other towns. The creditor makes an affidavit of his debt, which must be liquid, and must have been contracted within the range of the local custom. It is in form a process subsidiary to an attempt to recover the debt by ordinary action, and is in practice not made until certain returns have been entered to the effect that the defendant "has nothing within the city whereby he may be summoned, nor is to be found within the same." It is believed, however, that in practice these returns are fictitious, and that care is generally taken to keep the defendant from all knowledge of the proceeding. At the proper time, a notice is served on the debtor or depositary, warning him that the debts or effects are attached in his hands, and that he must not part with them. This person, who is in the same position as the arrestee with us, is thenceforth called the *garneshee*—in Norman French, the person warned. So far the proceeding is parallel to our process of arrestment; but it does not afford so effectual a means of execution. There are no means, like our forthcoming, of taking the property out of the hands of the *garneshee*; and, if he refuse to give it up, imprisonment is the only remedy. See Comyns. *vide* Attachment.

If all the means of execution in other countries had so close a resemblance to our own, it might not be difficult perhaps to apply the equalising rule of the sixty days anterior to the sequestration, though it would be quite impossible, even in these cases, to carry out the rule to any thing parallel to what is in Scotland the equalisation by accretion of diligence within sixty days before, and four months after, notour bankruptcy, (see p. 307.) But it is to be feared, that, if tempted by an incidental case of similarity like the above, an attempt were made to stretch the act to cover execution in other countries, the divergence that would be discovered to exist in many cases between our own forms and the corresponding ones of the other country would lead to a regret that so wide a field of vague inquiry had ever been opened. It is believed that foreign countries would often form more exact parallels to our method of proceeding than England. Except by the above described local custom, it is believed that there is no process equivalent to our arrestment followed in that part of the empire. Holland is said to possess such a form, and the French have a process apparently of a like character, bearing the name *saisie-arrêt*, (see *Code de Procédure Civile*, P. I. Liv. 5, T. 7. *Des Saisies Arrêts ou Oppositions*, of which the first paragraph is, "Tout créancier peut, en vertu des titres authentiques ou privés, saisir-arreter entre les mains d'un tiers les sommes et effets appartenans à son débiteur ou s'opposer à leur remise.")

SECT. 3.

VESTING OF THE MOVEABLE ESTATE AND MISCELLANEOUS RIGHTS.

(379.) *General Vesting Clause*.—By the retroaction of the confirmation of the trustee, "the moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt," are absolutely vested in him as from the date of the sequestration, "subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible."

Act, § 78. The clause was found, in the case of *Gordon v. Millar*, 12th Jan. 1842, 4 D. 352, to be absolute in its operation, and to carry all the estate that came within its terms. In this case it carried off a fund *in medio* in preference to arrestments used some months before the debtor's death, and previously to the passing of the act, reserving the arrester's preference in a distribution. See as to how far preferences on the estate of a deceased person are struck at, below, p. 315.

This clause operated a change on the law as it existed under the old act, resembling, at least in its terms, a corresponding change

in the bankrupt law of England. By the 6 G. IV. c. 16, § 63, it was enacted, that "the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt," &c. By the act for establishing a court of bankruptcy, by which the old system of granting a commission of bankruptcy was superseded, 1 & 2 W. IV. c. 56, it was enacted, (§ 25,) "That, when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose." The clause in the old sequestration act, as that in the old bankrupt act of England, appointed the property to be conveyed. "The nomination of the trustee being thus reported and approved of, the court shall at the same time ordain the bankrupt to execute and deliver, within a certain reasonable time, to be specified in the interlocutor, a disposition, or other proper deed or deeds of conveyance or assignment, making over to the said trustee or trustees, in their order, his whole estate and effects, heritable and moveable, real and personal, wherever situated," § 29. There are, however, peculiarities in the English law of bankruptcy, which make the change in the Scottish law more essential, at least as far as respects property in countries subject to the law of England, than the alteration in the English law is. The principle there is, that, from the date of the act of bankruptcy, every transaction with the bankrupt is null, in so far as it may affect his creditors, unless such transactions as have been specially excepted from the nullity by statute. The English common law courts, finding no such principle in a Scottish sequestration, viewed the compulsory conveyance to the trustee as a mere ordinary assignment, which, in the case of a chose in action, or a right of action, they do not acknowledge. In consequence of this, taken in conjunction with no right to sue being vested in the trustee, and the clause which qualified the trustee's right by the words, "in so far as may be consistent with the laws of other countries, where the effects are out of Scotland," the trustee was found to have no right of action in London for the balance of an account due to the bankrupt, *Jeffrey v. M'Taggart*, 6 M. & S. K. B. 126. See the case commented on, 2 B. C. 407.

The facilities thus given to the trustee in the new statute, are aided by § 49, which makes a certified copy of the act and warrant in favour of the interim factor, or of the trustee, give them, respectively, authority to sue, in all parts of the British dominions, in the same way as the bankrupt might have done if his estates had not been sequestrated. The awarding of the sequestration has now, therefore, at least in as far as respects property not within the jurisdiction of the court, become materially different from what it was under the old act. With respect to property

within the jurisdiction of the court, the clause directing the bankrupt to convey was fortified by a provision, to the effect that, in the order to convey, the court is to "declare every right, title, and interest which was formerly in the bankrupt, to be now in the trustee." But, by the existing act, without any conveyance, and without any adjudication, all moveable rights and interests vest from the date of the sequestration. Under the old act, the nature of the transference is thus described by Professor Bell:—"The judgment awarding sequestration, strictly speaking, is not in itself either an adjudication of the heritable, or a transference of the moveable property. It merely sets apart, as in *manibus curias*, and to be taken under the superintendence and care of a factor, to be chosen by the creditors, in consequence of the appointment of the court, the whole of the bankrupt's estate and effects, to be preserved for the use of the creditors, till they shall have had time to fix on a proper person in whom to vest the estate as their trustee." 2 B. C. 327. But see below, p. 317, as to the doctrine of later decisions on the old act.

In *Rattray v. White*, 8th March 1842, 4 D. 880, the principles relative to the vesting of estates according to the latter bankruptcy enactments, in both parts of the kingdom, were illustrated, with special reference to the English Insolvent Debtors' Act, 1 & 2 Vict. c. 110. By § 46, wherever a registered title is necessary to convey real property, the vesting, order, and appointment of the assignee, are to be registered as such title. By § 37, the estate vests in the assignee without conveyance. It was held, though with considerable difference of opinion, that the recording of the vesting, order and appointment, in the register of *sasines*, vested heritable rights in Scotland, and precluded diligence.

(380.) *Successive Trustees*.—The moveable estate vests not only in the trustee, but in "any succeeding trustee," from the date of the sequestration; and whether the creditors devolve the estate on the trustee next in succession, or elect a new trustee, the vesting goes back to the moment when the previous trustee ceased to hold the office.

Act, §§ 77, 78. The method by which a new trustee may be appointed, and the responsibilities to which he succeeds, are described elsewhere. Under the old act, in case of a new trustee, the adjudication had to be repeated to vest the estate.

(381.) *Property beyond the Jurisdiction of the Court*.—The court has indicated that it will interdict any creditor over whom it has jurisdiction, from proceeding to attach moveable property of the debtor beyond the jurisdiction of the court, and will take all competent measures for bringing such property into the hands of the trustee,

where the creditor who has attempted to attach it may plead any preference he is really entitled to in the courts of Scotland,

Lindsay v. Paterson, 10th July 1840, 2 D. 1373. The decision was on § 78, as above, which absolutely vests in the trustee all moveable property, wherever situated, from the date of the sequestration. The creditor was, in this instance, suing out a foreign attachment, according to the custom of London. (See above, p. 311.) It was a specialty in this case, that the creditor was a very important party to the sequestration, being the petitioning creditor, and the circumstance was noticed from the bench; but it does not appear that it influenced the decision, which seems to have rested on the general principle above set forth. If the creditor should break such an interdict, by proceeding with his attachment before the foreign judicature, the remedy would, of course, be damages for breach of interdict. The creditor, in this case, pleaded that the result of such an "interdict would be, that an English creditor competing with a Scottish creditor, in the use of similar steps of diligence against his debtor, would gain an unjust advantage; because the Scottish courts would tie up the hands of the Scottish creditor, in respect of his domicile in Scotland subjecting him to their jurisdiction, while the English creditor would go on and make his preference complete;" but the answer to this seems to be, that in the case of an English creditor proceeding with such an attachment, the trustee, in virtue of the clause vesting the estate in him, could appear in the English court, which would give effect to the act, and quash all proceedings from the date of the first deliverance, (see above, par. 379,) while, as a reason for his not proceeding in this manner against a Scottish creditor, he may adduce the superior convenience and economy of taking out an interdict in Scotland.

(382.) *Deceased Debtor.*—There are separate rules for the reduction of preferences over the property of a deceased debtor. They take effect only when the sequestration is dated within seven months after his death, and, consequently, there is no interference with any preference or security if the first interlocutor be dated more than seven calendar months after the death.

The securities reduced are, 1st, "Any preference or security for any prior debt, acquired by legal diligence on or after the sixtieth day before his death, or subsequent to his death." 2d, "Any preference or security acquired for a prior debt by any act or deed of the debtor, which has not been lawfully completed for a period of more than sixty days before his death." 3d, "Any confirmation as executor-creditor after the debtor's death." The estate, in any

of such cases, goes to the trustee. There is a provision, as in the case of an arrester or poinder, (par. 373,) for repayment of expenses *bonâ fide* incurred in diligence or confirmation.

Act, § 84. This provision appears to have been intended as a substitute, in the case of a deceased person's estate, for the arrangements making the sequestration an equalising diligence, in that of a living bankrupt. It is a totally new feature in the law of sequestration, and has not yet been illustrated by decisions.

See on the subject of the ranking on a deceased person's estate, independently of the statute, p. 106, *et seq.*

(383.) *Statutory criterion of date of alienation.*—In questions under the act, "all dispositions, assignations, and venditions which do not require sasine, but to which intimation or delivery is requisite, in order to render them complete as transactions or as securities," are to "be reckoned to be of the date of the intimation, delivery, or other act requisite for completing the same, without prejudice to their validity or invalidity in other respects;" while the sequestration is equivalent to intimation or delivery in favour of the trustee, at its date.

Act, §§ 25, 78. There is a similar clause in the old act, still in force, and which is elsewhere commented on as having reference, not to the effect of sequestration on the transactions in question, but to that of the act 1696, for the reduction of preferences granted within sixty days of bankruptcy. (See Book III. chap. II. § 2, p. 233, *et seq.*) According to the interpretation of that act, when the transaction is a *novum debitum*, it is not affected by the act; and as a delay in the completion of the transaction by intimation does not alter its character in this respect, it cannot, by the circumstance of such an event coming within the sixty days, be affected by the act. See p. 241, *et seq.* This doctrine cannot apply to sequestration, because, independently of the provision, which, as above, makes the sequestration an intimation of the transfer to the trustee, from the date of the sequestration, the debtor's hands are tied up, and he cannot, with the exceptions in the 85th section, as below, make any transfer of his estate, whether it be to a previous creditor, or for a *novum debitum*; whereas, within the sixty days, under the act 1696, the bankrupt is untrammelled in the management of his affairs, in so far as he does not give preferences to previous creditors.

Professor Bell was apprehensive that the old act was insufficient to prevent intimation, being an act done solely by the debtor, from coming between the awarding of the sequestration and the adjudication to the trustee, holding that the clause "is a provi-

sion applicable only to the construction of the act 1696, c. 5; and if the security were not for a prior debt, but in favour of a creditor who had lent money on the assignation being granted, it seems not to admit of doubt, that under that particular provision no exception could be taken against it. Unless, therefore, the doctrine held by the court in the case above alluded to [*Buchan v. Farquharson*, 24th May 1747, M. 2905, on the sequestration act 33 Geo. III. c. 74] shall be departed from, or the law shall be altered by the legislature, there is no security to creditors against the completion of assignations, after the awarding of sequestration, but by means of an intermediate adjudication, somewhat analogous to the English provisional assignment under a commission of bankruptcy." 2 B. C. 329. On the occurrence of a case, however, the court acted more in accordance with what the author thought the law should be, than with what he held it to be. See *Inglis v. Paul*, 26th Feb. 1829, 7 S. 469, where the necessary intimation of a lease to subtenants, made between the awarding and the adjudication, was found insufficient to carry the lease out of the bankrupt estate, see p. 237.

(384.) It is essential to this provision, that if a person have purchased commodities which have not been delivered at the date of the first deliverance, any subsequent delivery is null, unless it come under the exception below stated in paragraph 389, and that an assignee whose debt has not been intimated before the date of the first deliverance, cannot validly intimate it thereafter.

See the above commentary and the discussions under the act 1696, p. 232, *et seq.* In the case of *Roberts v. Wallace*, 28th July 1842, 5 D. 6, an attempt was made to assign a lease, and the crop and stocking on the farm, without change of possession, by an instrument of possession and symbolical delivery; and the removal of the crop by the assignee, subsequent to sequestration, (which was under the old act,) was held to be illegal. See *Paul v. Cuthbertson*, 3d July 1840, p. 178.

(385.) *What will be effectual delivery.*—In deciding what will be a good delivery to take moveables out of the sequestrated estate, the criterion is not the same as that on which the power of stopping in transitu may be exercised; for the goods will cease to be the property of the vender's creditors before they have gone into the vendee's possession, if they have gone out of that of the vender.

See this question considered at length, in relation to questions of insolvency, p. 170, *et seq.*

(386.) *Assignation of funds.*—In the case of the assign-

nation, by a merchant, of funds in the hands, or supposed to be in the hands, of his agent, intimation of assignation cannot be validly made to the effect of defeating the trustee's right, before the funds assigned have passed into the hands of the agent receiving intimation.

Pearson v. Brock, 12th July 1842, 4 D. 1509. This was in a sequestration under the old act. The application of the case of course presupposes sequestration occurring before the agent has received the funds. The assignation was granted to parties who had advanced money, by persons who had consigned goods abroad, and on the agent through whom they consigned them. Between the time when the agent received intimation of the assignation, and that when he received the proceeds of the consignment, his principals were rendered bankrupt. It was remarked by Lord Fullerton,—“ It does not follow that in every case it is indispensable that the party against whom the claim is assigned, and to whom the intimation is made, should have the funds actually in his hands. He may be a trustee, and the *jus exigendi* may be effectually assigned, although the trustee has not actually received the funds for its discharge. . . . If it had been made out that there was an actual conveyance to Paton in trust, a great deal might be said as to the effect of the intimation to him as trustee. But this is not the case here. Paton was a mere agent or mandatory, and no trustee; and the effect of the letter to him was merely that of a direction by the real proprietors of the proceeds to pay them over when he should receive them. But the sequestration intervened, and rendered this direction ineffectual.”

(387.) It has been held that a letter of credit purchased from one banker on another in favour of the debtor, in the usual form of a request “to honour the drafts,” &c. is not an assignation requiring notice, but a mandate to pay, and that if such a document come onerously into the hands of third parties before the date of the sequestration, they are entitled to the contents in preference to the trustee.

So it was held by several of the judges in the case of Struthers v. Commercial Bank, 27th Jan. 1842, 4 D. 460; but though the judges were unanimous in their decision, they were not unanimous in deciding on this view. The case involved some curious specialties. A party had paid into the Glasgow and Ship Bank at Kirkcaldy a sum of money for behoof of John Craig, and obtained a letter of credit from the bank on Sir W. Forbes & Co. in the usual terms, and at a fixed day, in his favour. Before the day of payment, Craig's son discounted the letter with the Commercial

Bank of Scotland, and indorsed it to that bank per procuracion. The day on which the letter was payable was a Sunday, and the Commercial Bank presented it to Sir Wm. Forbes & Co. for payment on the Saturday preceding; payment was refused, on the ground that application had been made for sequestration of Craig's estate. Sequestration was awarded on the same day. It was asserted and not denied that the awarding was decreed at a later hour than the demand for payment. The case is noticed elsewhere in connexion with this branch of it, (p. 331.) There was another incidental fact in the circumstance of the letter being presented a day before its date. It was said to be in conformity with the usage of bankers and merchants, when such a document fell due on a Sunday, to present it on the preceding Saturday. Lord Mackenzie, who concurred in the judgment, founded on this circumstance. He said, "There is a positive averment of an understanding among bankers, that when a letter of credit falls due on a Sunday, the money shall be paid on the day previous. If that be so, the practice must be of great weight. If all the bankers in London and Edinburgh are in the practice of paying on the Saturday in such cases, it would be going very far to disregard that practice." But there was still another specialty in this case. The note amounted to £1528, 2s. 4d. When Craig, junr. discounted it, he deposited the sum of £2500, (which included the contents of the note,) with a neutral party, and, at the time of the sequestration, £2250 of this remained not uplifted. At the same time there appeared to be due from Craig, junr. to his father's bankrupt estate the sum of £2265. Craig, junior, resisting a requisition by the Commercial Bank to hold the sum deposited to the extent of their advances for their behoof, uplifted the £2250, and paid it over to the interim-factor on his father's estate, receiving a guarantie against the risk of having to pay any part of the amount a second time. On this branch of the case Lord Gillies said, "The reclaimer's plea is, that by virtue of the sequestration and decret of adjudication and confirmation, the claimant, Struthers, as trustee, had acquired right to the sum of £1528, 2s. 4d. and interest due thereon. The answer is in point of fact, that he has already the money. It is clear that he received £2000, which he would not have got but for the advance made by the Commercial Bank. If he succeed in this action, therefore, the transaction will be attended with a gain to him of £1500." But this would be simply one of the hardships arising from a necessarily strict administration of the bankrupt laws. The son was owe his father money. The claim against the son was a good claim in favour of the trustee, whether the son had discounted the bill and deposited the contents or not. It is true that there might have been reasons not appearing on the record for presuming that if these circumstances had not occurred, the debt against the son might not have been so easily recovered by the trustee, but the circumstance that the amount against a

debtor has been paid, cannot affect the question whether another person is or is not entitled to keep funds out of the bankrupt estate. If the son, instead of preserving the produce of the cheque, and paying it into the bankrupt estate, had spent it, either for his father or himself, could this have affected the question, whether the Commercial Bank had got a valid transference? It is to be presumed that part of the son's debt to the estate, arose out of his having discounted this document. If, then, instead of so reserving the contents, he had squandered them, and lost them to the estate, it might have as equitably been said, that here was money which would not have been lost to the estate, but for the advance made by the Commercial Bank,—the conduct of that establishment being in both cases exactly the same.

Lord Fullerton said, "I am not much moved by the circumstance that the money was extant in the hands of the bankrupt's son, or by the argument that, if the trustee succeeded in the action, he would be getting payment twice over. For, if I were satisfied that the transference of the document was not available to transfer a right to uplift the money, I should be compelled to regard the advance made by the bank as in the same situation with an advance made on a security which eventually turned out to be bad. The result would be the very common result, not that the bankrupt's estate would receive payment twice, but that the estate would keep the money in the first place, and that for the debt created by the advance, the party advancing the money would be obliged to rank on the sequestrated estate as an ordinary creditor." This view calls up the most important question connected with the decision—the question, whether the indorsation of the letter of credit to the Commercial Bank for value received in discounting it, took the money it represented out of the bankrupt estate? These documents are of very frequent occurrence in Scotland; and the knowledge whether or not they can effectually be put out of the hands of the payee, so as to escape being mixed up with his sequestrated estate, is of the highest moment to trade. A balance corresponding to the sum in the letter of credit was due to Craig, senior, by his correspondent. That correspondent paid the money into the Glasgow and Ship Bank at Kirkcaldy, and received a mandate to Sir William Forbes & Co. to pay the money to Craig on a given day. The question whether the transference in the mean time to the Commercial Bank was a good transference to carry the money in competition with the trustee, depended on the prior question whether or not the letter of credit was negotiable? It seemed to be the general opinion of the bench that it was negotiable; and this opinion corresponds with the usage of trade, which has established such documents as one of the most frequent means of transmitting money in Scotland. If it was negotiable, then it was in the same position as a bill accepted by Sir William Forbes & Co., and indorsed to the Commercial Bank. It had no ana-

logy with a draft by Craig on Sir William Forbes & Co.; because, in that case, Sir William Forbes & Co. must have had a balance in their hand in favour of Craig, which would not be carried out of his estate until the draft was presented, and which would go to the trustee if sequestration preceded presentment. In this case, Sir William Forbes & Co. had no balance in favour of Craig. There was a mandate to them to pay to Craig, but the title to the money existed solely in the mandate; and if that mandate was indorsible, an indorsee for value came in the place of the original payee. The document and the money it represented changed hands by indorsement, just as a note of Sir William Forbes & Co.'s bank would change hands by being transferred. Lord Cuninghame, Ordinary in a note to his interlocutor, very clearly brought out this view. He said, "On the day he [Craig] delivered and indorsed for value the letter of credit to the Commercial Bank, he had no money in Sir William Forbes & Co.'s hands. He held an order on them to pay him a certain sum on a future day, and when he gave up and indorsed that order to another party for value, it is apprehended that he was thus divested of all legal and equitable interest in the obligation."

When it was considered that the paper was indorsible, it followed that it required no intimation. Lord Cuninghame observed, "The Lord Ordinary conceives, that this was not a case which required intimation to complete the right of an onerous assignee for value. The letter of credit here was a mandate by a bank on their agents in Edinburgh, to pay money to a party on a definite day afterwards. That mandate gave a complete right to Mr Craig to draw the money, without any farther intimation to the agent in Edinburgh than the bank itself would give; and, in like manner, if Mr Craig was not precluded from transferring the mandate, it is rather thought that the indorsee or assignee did not require to intimate it till the day the money was due, as payment could only be made to the party who presented the draft."

It is to be regretted, however, that the specialties in this case prevented the question from coming purely out,—Whether the letter of credit was a negotiable instrument or not? In connexion not only with bankruptcy, but with the stamp laws, that question is of the highest importance. The usual practice of English bankers, when they transfer money through their correspondents, is, to give no letter of credit, but to send advice to their correspondent directing him to put the sum in question to the credit of the person for whom it is intended. If this method had been taken in the present case, Craig would have had no other document but a letter of advice from his correspondent, useless in the hands of any other party. The money would have been so much money lying with the bank on his account. It would be transferable by his draft, but until uplifted it would be liable to be carried by sequestration. It is a matter of consider-

able moment to ascertain whether the method of transmitting money by letters of credit possesses such important privileges.

(388.) *General Nullification of Transactions subsequent to Sequestration.*—Besides the enactments for reducing diligences and preferences, there is a special clause, that “all payments and preferences, or securities,” to prior creditors, “and all acts done, or deeds granted by the bankrupt after the date of the sequestration, and before the discharge,” unless done with consent of the interim factor or trustee, are, in the case of sequestration being awarded, null,—the subject going to the trustee “deducting any expense *bonâ fide* incurred.”

§ 85. This is the clause which ties up the bankrupt's hands from the moment of the first deliverance, and the effect of which has been so often alluded to, as cutting down those completions of transactions which, under the act 1696, or other grounds of reduction which do not proceed on the debtor being legally incapacitated to act in any way whatever in regard to his estate, might be supported.

(389.) *Bonâ fide Delivery.*—As a protection to commercial transactions, it is enacted, that, “if a *bonâ fide* purchaser is in possession of moveable effects, received from the bankrupt after the sequestration, and when ignorant thereof, for a price paid, or which he is ready to pay, he shall not be obliged to restore the effects.” In interpreting this clause with what precedes it, 1st, A sale and immediate delivery, after the first deliverance in the sequestration, will be good, if the purchaser was not aware of such deliverance; 2d, Where the price of goods purchased has been paid, delivery after the first deliverance in the sequestration will be unimpeachable, if both parties were ignorant of the deliverance.

Act, § 85. There cannot be a doubt that this exceptional clause reaches the transactions to which it is applied in the above proposition. It may be a nice question in legal criticism, whether or not it goes farther. The literal meaning of the clause, as printed and punctuated, would lead one to the understanding that it protects every delivery, after sequestration, of moveables which have been previously paid for, if the party receiving them was ignorant of the sequestration. This would create a great revolution in the bankrupt law, and would settle at once the large class of cases which involve the question whether effectual delivery was made before the bankruptcy. If this view were to rule, it would be on the ground that the question of *mala fides* is ap-

plicable to the conduct of the buyer. The question would be, did *he* know of the bankruptcy when he took delivery? and, as the door would thus be shut against any inquiry into the intention of the bankrupt, it might be that his object was, in the full knowledge of sequestration being awarded against him, to make delivery of goods in his warehouse to a purchaser, with the view of preventing that purchaser from suffering by the bankruptcy. This would be an inversion of the principle of reduction under the act 1696, which depends, as already shown, (p. 228,) not on the intention of the creditor, but on that of the debtor. But it can scarcely be supposed that this was the design of the legislature. If it had had in view the protection of transactions performed by the debtor in the full knowledge that he was a bankrupt, some line would have been drawn where the license must stop, and the matter would not have been left in the position which it must hold if this view be adopted, viz. that at any time during the sequestration, if goods that have been paid for can be got out of the warehouse of the seller and put into that of the buyer, the transaction is good, provided the latter was not aware of the sequestration. If this were law, a man might, with concurrence, petition for sequestration; and when it is awarded, he might, on the ensuing day, deliver commodities to a purchaser ignorant of his proceedings, and this delivery would be unimpeachable.

The intended object of the clause, instead of being of such a character, must have simply been to ratify those transactions solely which are the result of the *bona fides* of both parties,—in which both are ignorant of the sequestration. In this view, it would apply only to delivery made after the deliverance granting warrant to cite the bankrupt, (which by relation backwards, becomes the date of the sequestration,) and before the service of the citation upon him. Unless, as applying solely to the case of ignorance and *bona fides* on the part of the bankrupt, the clause in question would be found incompatible with the other portions of the act. The general enactment is, that “all acts done, or deeds granted by the bankrupt after the date of the sequestration, and before his discharge, out of or in relation to the estate, . . . shall, in the event of sequestration being awarded, be null and void.” But then, in connexion with this sweeping clause, comes the consideration, that a man may, by relation, be bankrupt without knowing it. He may have his shop open, and may be dealing with his customers as usual, giving delivery, at his leisure, of commodities paid for before delivery—it would be hard that these transactions should be reduced, and an exception is made where there is ignorance and *bona fides*. A clause, however, protecting such transactions when the bankrupt knows his situation, would not be an exception, but a contradiction—a provision, the interpretation of which in harmony with the one immediately preceding would be impossible. It must be observed, however, that though by the phraseology of the act, as printed and punctuated, if the

qualification of ignorance is made applicable to the purchaser, it may, by a change of punctuation and allowance for an elliptical expression, bear a different reading. Punctuation goes for nothing in acts of Parliament, and the transposition of a comma will make the clause read in such a manner as to make it the bankrupt's ignorance of his own position that will support the transaction—thus, “If a *bona fide* purchaser is in possession of moveable effects, received from the bankrupt after the sequestration and when [he is] ignorant thereof,” &c.

As a matter of policy, it is pretty clear that the understanding that a bankrupt may make good delivery after he knows himself to be sequestrated, would give him a dangerous power of making preferences among his creditors. In the case of *Lang v. Bruce*, 7th July 1832, 10 S. 777, see above, p. 165, it was strongly urged, that it was a dangerous precedent to admit that, after insolvency, a dealer could validly deliver articles bought and paid for. In addition to what has been already stated, there is a circumstance which would make the doctrine contended against on this occasion much more unjust than the retention of a power to make delivery after insolvency. It is always admitted that if delivery can be validly made, it can likewise be demanded, and that by a creditor in the full knowledge of the insolvency; and thus purchasers of undelivered goods are, to a certain extent, on a par. By the supposition in the present instance, delivery or not is wholly in the bankrupt's option. If the purchaser should demand delivery the bankrupt may resist; and, by stating the position in which he is placed, at once place both parties in *mala fides*, while he makes delivery without intimation to favoured creditors. Under all these considerations, it is to be hoped that no reason arising out of a strict interpretation of terms will cause this exceptional clause to be made wider than the principle stated in the above proposition.

There is a material difference between delivery, after the bankruptcy, of goods paid for before it, and a sale, after the bankruptcy, accompanied by delivery and payment. If the latter be a sale for a just price, there is no creditor benefited, and no ground for an inquiry into *bona fides*. The transaction is, moreover, protected by the next part of the section which applies to *bona fide* payments. Of course it is open to prove a fraudulent device connected with such a case, but the circumstances will not of themselves give ground for inferring it; and, indeed, in the general case, if the bankrupt continues doing business after the sequestration, he is acting by the permission of his creditors for their benefit.

Wherever, in the case of delivery of goods paid for, *bona fide* is alleged and denied, it would seem that, in conformity with the view of the House of Lords in the case of *Blinco's trustee v. Allan & Co.* 18th March 1830, (5 Mur. 231, and see above, p. 214,) it would require to be sent to a jury as a question of fact.

(390.) *Bonâ fide Payments*.—"If a debtor, when ignorant of the sequestration, have paid his debt *bonâ fide* to the bankrupt, he shall not be obliged to pay it a second time to the trustee." It does not affect the validity of the transaction that the bankrupt receiving the debt, knows his own situation.

Act, § 85. Here we have the converse of the immediate preceding clause; but both on principle and in the clear phraseology of the sentence, the benefit of acting in ignorance accrues to the person who so acts. It is the creditor who pays, and it is the creditor's ignorance of the sequestration that will validate his payment. As in the immediately preceding case, it would seem that the *bona fides*, if denied, is a question which must go to a jury.

(391.) *Bills*.—A person who holds as indorsee, or by any other just title, a bill or note with recourse on other parties, which is payable by the bankrupt, if he "shall have received payment of his debt from the bankrupt in ignorance of the sequestration, and given up such bill, promissory note," &c. he is not to be made liable to repay to the trustee the amount so received, "unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage." The same law applies to a creditor holding a security, and giving up the security, when the transaction is in *bona fides*.

Act, § 85. There is here the same grammatical ambiguity as in the provision regarding the delivery of moveables, viz. the doubt whether the "ignorance of the sequestration" is conjunctive with the bankrupt, or with the holder of the bill. In this case, however, there is a greater leaning towards an intention to apply the qualification to the bankrupt than there is in the other case, and this appears to have influenced the printer in the punctuation.

It has to be observed, that the mere giving up of the bill will hardly, in any case, "replace" the holder "in the situation in which he stood." The holder will probably have lost his recourse, by want of negotiation. Unless the trustee make good all that the holder has thus lost, the latter is not bound to give up the bill; and, in the general case, payment such as that here contemplated, will be a final and valid payment, as the estate could gain nothing by getting back the bill on such terms.

(392.) *Trusts*.—If there be any title, such as that to a share of a joint stock company, which, though in the bankrupt's name, was truly held by him as trustee for another

person, it does not come within the sequestration; and the decisions indicate that when the estate of a co-trustee is sequestrated, the court will allow an accounting, to show how far securities held in the name of the bankrupt co-trustee, taken for the use of the trustees in general, represent advances which the individual trustees have made.

Dingwall v. M'Combie, 6th June 1822, 1 S. 463; Stirling & Sons v. Stirling & Robertson, 5th July 1822, 1 S. 545; Gordon v. Cheyne, 5th Feb. 1824, 2 S. 675; Cook, &c. v. Jeffrey, 29th Nov. 1831, 10 S. 75; affirmed 15th May 1835, 1 S. & M'L. 767. But see below as to the reversal of a point on the vesting of heritable property, p. 336. This was a very complicated case, where trustees had made advances of various amounts for the purposes of the trust, sold trust property, and taken securities in their individual names, when one of them was sequestrated. In the case of Gordon, the trust had been latent for fourteen years. This enforcement of latent trusts has been objected to as contrary to the spirit of the bankrupt law, (1 B. C. 286); and in Gordon's case, the Lord Ordinary alluded to the previous case of M'Combie, as rendering a decision in favour of the latent trust imperative, though he seems to have thought it an innovation. The principle of the final decision in the case of Gordon, as announced in the brief note of the opinions of the judges, was, that the trustee on the sequestrated estate "took the rights of the bankrupt *tantum et tale* as they stood in his person." It has to be observed, that a bankrupt's trustee's title has, by the late act, been made nominally different from what it was by the old act. By the latter, there was a special adjudication; by the present act, all the moveable estate is vested in the trustee by virtue of the awarding, without any adjudication. But it is much to be questioned whether there would be in this any reason for holding the law of latent trusts to be affected.

In England there is the following provision for the disposal of property held in trust, 6 Geo. IV. c. 16, § 79:—"If any bankrupt shall, as trustee, be seized, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon, or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipts of the rents, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees, and all persons whose act and consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities, to such person or persons as the Lord Chancellor shall think fit, upon the same trusts, as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy,

or such of them as shall be then subsisting, and capable of taking effect; and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct."

It is held that this clause does not protect latent trusts. Thus in *ex parte* Burbridge, 15th Aug. 1835, 1 Dea. 131, in a joint stock company, there was a rule against a party holding in his own name more than a certain number of shares, but no rule against his having a beneficiary interest in a larger number. A person who had purchased more than the limited number, had them entered in the name of a trustee, with the knowledge of one of the directors, and of the actuary. The trustee signed a declaration of trust. There was no notice of the fact of the trust in the company's books, and the trustee held the certificates of the shares, and received the dividends, accounting to the purchaser. The trustee received the notices, attended the meetings of shareholders, &c. The trustee became bankrupt. The court of review held, that the shares were not within the bankrupt estate, (*ex parte* Watkins, 4 Dea. & Ch. 87;) but, on appeal, the Lords Commissioners reversed the judgment, and it was solemnly decided that such trust property is part of the bankrupt estate of the trustee. This decision brought the stock within the 72d section of the act as goods and chattels in the order and disposition of the bankrupt. Founding on this decision, in *ex parte* Witham, 18th March 1841, 1 M. D. & D. 624, an attempt was made to hold government stock standing in the name of a trustee, who was not entered in the books of the bank as trustee, part of his bankrupt estate, but it was found that § 80 of the act, which provided for the passing of government stock, held by the bankrupt in his own right, to the assignee, virtually excepted such stock held by him in trust.

(393.) *Latent Rights to Moveables.*—To take moveables in possession out of the act, it will have to be shown, 1st, That the possession is held by virtue of one of the contracts, inferring temporary possession, such as letting and hiring, pledge, &c. 2d, That there is a right of hypothec extending over them, and in this respect the landlord's hypothec is specially reserved by the act. 3d, That they have been acquired by the fraud of the bankrupt. 4th, That they are stolen property reclaimed by the person from whom they were stolen.

A clear distinction may be taken between the possession of titles, such as those of shares in joint-stock companies, and the possession of moveables, the possession being the external evidence of property in the latter, to the exclusion of ordinary latent rights.

Hypothecs will be found considered above, p. 68. The landlord's hypothec is saved from interference by § 96 of the act.

It is not easy to define the nature of the fraud that will take a commodity out of the act. In the Lord Ordinary's (Moncreiff) note, in *Gibson v. Forbes*, 9th July 1833, 11 S. 916, see above, p. 252, there is the remark, "Creditors, indeed, are not liable to all the obligations of a bankrupt, but they are liable to obligations of trust or deposit where they are specific. Even money, when it is in any way ear-marked or traceable, as held by a title of agency or trust, has been awarded to the true owner." There is the farther remark, that "it would be against all equity to permit the creditors of a bankrupt to take advantage of that which, if done by the bankrupt, would be a great fraud;" and this is said in reference to the title of the trustee to goods set apart in the seller's premises as the property of the buyer. It would appear, however, as it is pretty amply shown in the other opinions in the case of *Gibson*, that it is only when it has been derived through a specific fraud of the bankrupt, that the trustee's title to the property is bad; and that the trustee, taking advantage of that which it would be a fraud in the bankrupt to take advantage of, is not a relevant objection,—*e. g.* the trustee taking advantage of the non-delivery of goods purchased. See the case of *Mansfield*, p. 247, and *Miller*, p. 344.

With regard to radical vitiations in the title, accompanying property into whatever hands it may fall, until the vice be purged, the law of Scotland admits none in moveables, but punishable crime. There is no doubt that theftuous acquisition vitiates the title,—the vice being pleadable only by the person from whom the abstraction has been made, who may recover the article wherever he sees it; and it is no purification of the vice, that the commodity has been purchased in public market, as it is in England, (2 Blackst. 449); see *Henderson v. Gibson*, 17th June 1806, *M. Moveables*, App. No. 1. It is difficult to say whether there is any minor fraudulent offence, such as breach of trust, which would confer this permanent nullity on its subject. Professor Bell says, "In one case, very nearly approaching to theft, the judges seemed to think the exception would be so extended," 1 B. C. 286. That it has been obtained by threats or violence vitiates the title, (3 E. 1. 16;) and it is difficult to suppose a moveable commodity so obtained, without the commission of robbery, which will of course in this respect be on a par with theft.

(394.) *Wife's Property*.—Property of the bankrupt's wife, as to which the *jus mariti* is excluded, does not come within the sequestrated estate; and in an antenuptial contract, where the *jus mariti* is not expressly excluded, the separate property of the wife may, by being virtually excluded from it by destination, be kept out of the sequestrated estate.

Black v. Pearson, 9th Feb. 1841, 3 D. 504. There were here two forms of destination. One by the wife to herself and her husband in liferent, and to the children of the marriage in fee; "whom failing, to herself and her own heirs, executors, and assignees whomsoever." The other was a conveyance to herself and her husband in conjunct liferent, "and to herself, her own heirs and assignees in fee." These clauses were held to vest the property in the wife; and, being distinguishable from the husband's funds, existing, indeed, in the shape of a reserved burden on the heritable property of a relative of the wife,—it was held not to be part of the bankrupt estate. In *Rollo v. Shaw*, 28th Nov. 1832, 11 S. 132, where the doctrine, that property conveyed by a wife in an antenuptial contract, "in conjunct fee and liferent, for the liferent use alienably of the longest liver, and to the children of the marriage in fee," gives the husband a mere right of liferent, and excludes his creditors, was established. Lord Mackenzie, whose judgment was affirmed, said, "The Lord Ordinary considers the circumstance, that the fund was executry instead of land or a bonded debt, as of no relevancy, and does not think that intimation of this assignation to the debtors in the fund was necessary, in order to exclude the creditors of the husband, nor that express exclusion of the *jus mariti* was necessary in order to exclude these creditors. The Lord Ordinary does not think that the *jus mariti* has any operation to cut down conveyances made of the wife's fortune by antenuptial contract in her own favour, or in favour of the children of the marriage." *Boaz v. Loudon*, 7th March 1829, 7 S. 555, was a case where the trustee endeavoured to show that a right taken to the wife, was part of a plan for defeating the husband's creditors, but failed in doing so.

(395.) *Money in third party's hands for Creditor's behoof*.—The statute will not carry funds which have been placed by the bankrupt in the hands of a third party, for behoof of his creditor, before the sequestration; and, if such a person pay to the trustee, he will be liable to refund to the creditor for whose behoof he held.

Brierly v. Mackintosh, 1st June 1843, 5 D. 1100. A contractor's agent received from him a draft on his employer, intended, apparently, to meet several debts by the contractor. The contractor wrote to the agent, specifying one debt which was to be paid, and the agent acknowledged intimation. Afterwards, on the contractor being sequestrated, the agent, without paying the whole of the debt in question, handed over the remainder of the funds to the trustee. He was bound to refund. The Lord Ordinary held that, on the principle on which, in the case of *Gordon*, as above, (p. 312,) property under arrestment came within sequestration, the money must be held as belonging to the bankrupt, subject to claims, "and that how clear soever the pur-

suer's right to be paid preferably may be, it is before the trustee that this right must be asserted." This contemplates the possibility of a preference over the fund after the trustee was found entitled to attach it. According to the principles of the bankrupt law, however, there can be no preference over a fund vesting in the trustee, unless for a preferable debt. The exception in favour of creditors, from the general right of the trustee to hold all the bankrupt's funds, is in favour of "such preferable securities" as existed at the date of the sequestration. If there be no security, but simply a sum of money, the question will be, whether it is a third party's, or vests in the trustee. If the latter be the case, there cannot exist a preference over it in his hands.

(396.) *Money Consigned*, to wait the order of a court in a depending process, is not within the bankrupt estate of the person consigning it; and the deposit of a bank receipt with the clerk to the process, with an indorsement of the purpose for which it is deposited, is sufficient consignment to such an effect.

Gordon v. Brock, 13th Nov. 1838, 1 D. 1. This case was, of course, under the old act, but there is nothing in the principle of the decision which would not hold under the new; and the case is of importance as showing the means by which, when there are disputed claims to funds in the hands of a party, arrangements may be made to prevent them from being included in his bankrupt estate, if he should be sequestrated. It frequently happens, that when people, having money passing through their hands, find themselves in difficulties, they become ingenious in discovering objections to the title of the claimant; and, by the delays they thus create, finally involve the property in their ruin. Where there are objections brought to the title of the claimant, and there is any fear of such a catastrophe, it is important to know that an action commenced by the claimant, and consignation by the holder, secure the property. In this case, the holders of the money seemed to have good reason to doubt whether they would be safe in paying to the claimant. They placed a bank receipt in the hands of their law agents, and, on a summons of multiplepoinding being executed, the law agents deposited it with the clerk to the process, indorsing on it a statement that it was the balance which the debtors admitted they were due, and that it was lodged in the process, "in order to be disposed of as the court shall appoint." There was no intimation to the bank. Afterwards, the Lord Ordinary, in the process of multiplepoinding, ordered judicial consignation to be made, and a receipt to be taken, "payable to such person or persons as shall be preferred by the Lord Ordinary or the court." Before this order was implemented sequestration took place, and the question stood on the deposit of the receipt. Lord Gillies remarked, "It has been pleaded by

the trustee of Messrs C., that this consignment, when made, was only a consignment in security. But so is every consignment; and what is it that is to be secured against by consignment, but the risk of the debtor's bankruptcy? When that precise case occurs, therefore, it would be a very strange result if its occurrence was to be a ground for rendering the consignment nugatory, and finding that it afforded no security whatever." That it has been placed *sub judice* is, however, the circumstance that, in such a case, carries the money completely out of the bankrupt estate. It does not appear that the object could be accomplished by a deposit of the amount of the disputed claim in the hands of a private party, or that such a depositary could be considered as holding otherwise than for the depositor, unless, as above, it be a specific sum to pay an onerous and ascertained creditor. See *Gray v. Ross*, 16th Jan. 1706, M. 7724; *Baird v. Murray's creditors*, 4th Jan. 1744, M. 7737.

(397.) The trustee, as representing the creditors, takes their right to reduce alienations to their prejudice at common law, alienations reducible under the act 1621, c. 18, and preferences reducible under the act 1696, c. 5.

See above, B. II. & B. III.

(398.) When trust property, or any other property which should not by law come within the sequestrated estate, is nevertheless involved in it, the course for the party in right of it to adopt is a petition to the Lord Ordinary, "praying to have such estate struck out of the sequestration." The Lord Ordinary orders the trustee to answer within a certain time, not fixed by the act, and, at the expiration of the time, proceeds to dispose of the application.

Act, § 86.

(399.) *Effect of Application for Sequestration.*—It is no objection to a creditor claiming payment of a just debt from one who would otherwise be bound to pay it as a mandatory of the debtor, that a petition has been presented for sequestration of the debtor's estate; and especially such an excuse will not justify a banker in refusing to honour the draft of the debtor, if presented at the time when it is properly payable.

Struthers v. Commercial Bank, 27th Jan. 1842, 4 D. 460. In this case there was a refusal by a bank to pay a draft which they would otherwise have paid, they giving as a reason that the estates

of the party in whose favour they would have to pay the money were in course of sequestration. The right to the money was litigated on different grounds, and the bench, though unanimous in their judgment, were far from being so in the grounds on which they rested it. It seemed not to be doubted, however, that whoever might be found entitled to the funds, the reason stated by the bank for refusing payment was not a good one. The principle has been stated as only applying to the case where a petition has been presented; and it may be noticed that, in practice, there is now, generally, but a fraction of a day between the presentation and a first deliverance. If there has been an interlocutor for intimation, or to any other effect, if the bank should refuse payment on *that* ground, and the sequestration should be afterwards awarded, there is no doubt that the bank would be justified, because the sequestration exists by relation from the date of the first interlocutor. Bankers and other mandatories are, however, in a difficult position in connexion with the principle of relation. If they honour a draft in ignorance of the proceedings, they will undoubtedly be saved by the clause in § 85,—“And if a debtor, in ignorance of the sequestration, have paid his debt *bond fide* to the bankrupt, he shall not be obliged to pay it a second time to the trustee.” Honouring a draft is certainly paying a debt—the banker who is in funds is a perpetual debtor to his employer, liable to pay in such instalments as the latter may arbitrarily fix by his drafts. But let it be supposed that the banker is aware that there is a deliverance on a petition for sequestration, though sequestration has not been awarded. If he refuse to honour the draft, and the sequestration is not ultimately awarded, will he be liable in damages? If he pay the draft, and sequestration *is* awarded, will he be liable to refund to the trustee? On the whole, it would appear to be the safer course for the banker to refuse payment in such a case, or to require a guarantie.

SECT. 4.

VESTING OF THE HERITABLE ESTATE.

(400.) *General Vesting*.—The whole heritable estate of the bankrupt in Scotland is vested in the trustee and his successors, absolutely and irredeemably, by virtue of the act and warrant, which has the same effect in law as a decree of adjudication in implement, as “a decree of adjudication for payment and in security of debt, subject to no legal reversion,” recorded at the date of the sequestration, and also as a poinding of the ground then executed. The right is taken, subject to all preferable securities, at the date of the sequestration, not null or reducible.

Act, § 79. The trustee is thus, in virtue of his act and warrant, in the position of one who has obtained decree of adjudication, as above; the adjudication, in as far as it is in the position of a simple adjudication for debt, dating back to the first deliverance, (§ 82.) When the trustee has registered his confirmation in the Register of Abbreviates of Adjudication, it carries all personal rights to heritable property in the bankrupt as at the date of the first deliverance. In rights which do not require sasine, the trustee's right is indefeasible by any proceedings subsequent to that date; but, where sasine is required, the holder of an inchoate feudal title may be first on the register, and get his right made real, by a previously recorded infestment. How far such an infestment is open to reduction is considered below. The safe plan for the trustee will however be, if there is reason to fear that such rights may come into competition with him, immediately to get himself infest on a charter of adjudication. If there is no reason to fear such a competition, the trustee does not require to make up titles, to give a valid title, with procuratory and precept, to a purchaser, § 87. In as far as respects other adjudications, this clause will be construed along with § 82, which brings the estate affected by a first effectual adjudication within year and day before the first deliverance, within the sequestration.

Inquiry whether the Sequestration is a mid-impediment to Infestment by a Donee.

(401.) The question, whether the general vesting in the trustee renders reducible an infestment subsequent to the sequestration, on a warrant contained in an alienation anterior to it, seems to be again made an open one, as it at one time was under the old acts, although the leaning of authority is in favour of the right of the holder of an unexecuted precept to use it. In the earlier editions of his Commentaries, Professor Bell held, that the sequestration was no mid-impediment to prevent the holder of a personal right from completing it by sasine. In his last edition, "on reconsidering the matter," this view is recalled; and he says, "Although directly there is not, in express terms, any prohibition against the taking of sasine, or of delivery of moveables, or against intimation of an assignment; yet, in fair construction, a statute which declares the dates of those acts to be the date of the security which they are employed to complete, and which orders regard to be had only to preferences obtained by security or diligence before the first deliverance, must have the effect of preventing such acts from being set up as mid-impediments to the completion of the trustee's title," (2 B. C. 405.) In the case of *Cormack v. Anderson*, 8th July 1829, 7 S. 868, it was however decided that a sequestration was no mid-impediment to the holder of an heritable security taking infestment on his warrant. Owing to this decision, Professor Bell, in his Commentaries on the Recent Statutes, (p. 168,) has returned to his former opinion. On the

vesting clause, (§ 79,) he says, "The effect of this provision as to such heritage as requires sasine, is to make the trustee run a race of diligence for the obtaining of sasine with creditors holding an inchoated security, the first completed right being preferable." The same view appears to be adopted by the Lord Ordinary (Ivory) in *Melville v. Paterson*, 1st June 1842, 4 D. 1311, when he says in his note, "No doubt, the right thus declared to be vested in the trustee will be no better than a right *tantum et tale* with what actually belonged to the bankrupt at the date of sequestration; and where the bankrupt, therefore, has previously granted a prior *personal right* in the shape of a conveyance or security, to an individual creditor or other third party, upon which it would be in the power of such a party to run a race against the trustee, it may be necessary for the latter, with a view to exclude the completion of this inchoate right, to obtain his own title first completed, according to all the feudal forms, and so entered upon the records."

Mr Alexander adopts the same view in his Digest of the Bankrupt Act, p. 91; and, in the case of *Lindsay v. Giles*, referred to below, p. 338, there is the following remark by the Lord Ordinary (Cunninghame):—"The law allows special creditors, notwithstanding a sequestration, to execute precepts or assignations previously granted to them, so as to secure possession before the trustee." There are, however, peculiarities in the new act, on the ground of which this doctrine might be opposed, even with the admission of its application to the old act. By § 25, "In all questions upon this act, all dispositions, heritable bonds, or other heritable rights, whereupon infertment may follow, shall be reckoned to be of the date of the registration of the sasine taken thereon, without prejudice to the validity or invalidity of the said heritable rights in all other respects." The literal enacting meaning of this would seem to be, that if an alienation by the bankrupt would be struck at if made after the date of the sequestration, so would an infertment on it, though the alienation itself were anterior to the sequestration. If the clause were merely in explication of the act 1696, it might be otherwise. It has been seen that under that act, if the alienation be for a *novum debitum*, the transaction being good in itself, will not be struck at by the sasine coming within the sixty days, (p. 241, *et seq.*) Within the sixty days of bankruptcy, the debtor's hands are not tied up; but after sequestration, he is dispossessed of his estate: he cannot transact even for *nova debita*. By § 85, "All acts done or deeds granted by the bankrupt, after the date of the sequestration, . . . shall, in the event of the sequestration being awarded, be null and void;" and it may be held that the sasine bringing the alienation within that period, makes it an alienation by a sequestrated bankrupt.

It has to be kept in view that there is a similar clause to make venditions of moveables be held of the date of the delivery, see

p. 316. To obviate hardship by the nullification of *bonâ fide* transactions of this class during the dependence of sequestration, there is a clause, already commented on, for the protection of such acts of delivery. The omission of a corresponding clause applicable to sasines, is an additional reason for presuming that it was intended by the act to strike at infeftments which would defeat the title of the trustee. On the other hand, however, § 78 declares the sequestration equivalent to intimation, and thus there is a special enactment to prevent *assignments* being completed after its date, but none to prevent infeftments.

In the case of *Rattray v. White*, 8th March 1842, 4 D. 880, above noticed, (p. 314.) the vesting order in the assignee of an insolvent's estate in England, being registered in the register of sasines, was found to give a preference over a pursuer of an adjudication. This proceeded under the clause in the act which requires that where "any conveyance or assignment of any real or personal property," would require to be registered, the certificate of the vesting order, &c. is to be registered in its place. Although, in this case, such a recorded order came into competition only with the creation of a personal right by decree of adjudication, it would seem that from sanctioning the recording in the register of sasines, it is to be held that recording the order is equivalent to recording a sasine. It would be difficult to follow out such a principle in all its consequences; but if it be held that the sequestration is no impediment to the completion of a title, as above, this decision will, to all appearance, if carried out, have the effect of making the English assignee's title, by his recorded vesting order, &c. a real right, while the Scottish trustee's registered act and warrant is only personal. It may be observed, that to have put him on the same footing with a Scottish trustee, the English assignee's title should have been made recordable in the register of abbreviates of adjudication. The terms of the statute required, however, not that it should be entered where real diligences are recorded, but in the register where conveyances are recorded. It may be observed that in the English bankruptcy court act there is a similar clause for recording the title of an assignee in bankruptcy, which, it may be presumed, will receive the same interpretation. 1 & 2 Wm. IV. c. 37, § 27.

(402.) After the sequestration, the bankrupt cannot do any act which will affect the title to his heritable property as it stands at that date.

Mansfield v. Walker's trustees, referred to, p. 247. In *Paul v. Turnbull*, 22d May 1835, 13 S. 818, the holder of an heritable bond, on which infeftment had been taken, on its being found that the feudal title of the sequestrated granter was inept, got him to sign a claim of service as heir under a particular deed, served him heir, and infeft him. This was found ineffectual to validate the holder's infeftment.

(403.) *Inhibition*.—The trustee's right is not challengeable on the ground of a prior inhibition, the inhibitor's claim being reserved in the ranking.

Act, § 79. On the nature of an inhibition, and its position in a ranking, see above, p. 74. The inhibition can only have effect in competition with debts subsequent to its date; and it may thus, in ranking, be the means of dividing the general creditors into two classes, one of which ranks on a fund, on which the other does not.

(404.) *Deceased Debtor*.—The clauses vesting the estate in the trustee have been found, with special reference to the heritable estate, to apply in the case of the sequestration of a deceased person's estate, in the same manner as in that of a living bankrupt's.

Melville v. Paterson, 1st June 1842, 4 D. 1311. This was a question raised by a purchaser of part of a sequestrated estate, who maintained that the title offered him by the trustee, in virtue of the general vesting clause, was defective. He maintained, that the use of the term bankrupt, and some other specialties, indicated an intended limitation of this clause to the estate of a living person; but the objection was overruled.

(405.) *Limited Title*.—Where there is any limitation of the bankrupt's right, by entail or otherwise, there is a corresponding limitation in that acquired by the trustee, whose right "shall be effectual only to the interest in the estate which the bankrupt might legally convey, or which the creditors might validly attach."

Act, § 79. See *Renton v. Girvan*, 20th Dec. 1833, 12 S. 266. In *Black v. Pearson*, 9th Feb. 1841, 3 D. 504, where funds to which a wife had a right by succession, were, by antenuptial contract of marriage, appointed to be vested in such a manner as not to be part of the husband's estate, and the heir of her father sold his heritable estate, making her provision a real burden on it, it was held, that though the *jus mariti* was not specially excluded, and this was not an investing by the parties in terms of the contract, the property was not taken by the trustee on the husband's sequestrated estate.

(406.) *Latent Claims*.—Heritable rights standing in the bankrupt's name on the records, are not affectable by latent trusts or other claims.

Jeffrey v. Paul, App. 15th May 1835, 1 S. & M'L. 767. Here there were trustees, several of whom were in advance to the estate, and had claims on the trust property. There was an

heritable bond and disposition in security for a sum, the price of trust-property disposed of, taken in name of the trustees as individuals, and so appearing on the record. The House of Lords held, reversing the judgment of the Court of Session, that the bankrupt's share of the security was not affectable by the claims either of the trust estate, or of the trustees who had made advances to it. There was another security peculiarly situated. The trustees disposed part of the subjects, by a title, granted in their character of trustees, which made part of the purchase money a reserved burden. They afterwards took from the disponee an heritable bond and disposition in security for that sum, payable to themselves as individuals, without discharging the real burden which they had reserved in their character of trustees. It was held, both in the Court of Session and the House of Lords, that this sum fell to be applied, in the first place, to meet the outstanding obligations of the trust; and, in the second place, to indemnify those trustees who had made over advances. The operation of a like principle would arise in the case of *Mansfield v. Walker's trustee*, decided on appeal, nearly contemporaneously, (10th April 1835, 1 S. & M'L. 203,) referred to p. 247. No means could, in that instance, be devised by which heritable property, standing in the bankrupt's name on the record, could, after the sequestration, be made to stand in the name of a person to whom, by the understanding of the parties, though not in reality, a title to it had been put on record. For the judgments containing the principles of feudal law on which Jeffrey's case rests, see *Russell v. Ross's creditors*, 31st Jan. 1792, M. 10300; *Ferguson v. Mitchell*, 13th Feb. 1781, Hailes, 879.

The case of *Lindsay v. Giles*, however, noticed under the next paragraph, leads to a doubt how far the exclusion of fiduciary claimants on property apparently absolutely vested in the bankrupt, would be carried. If the circumstances of that case had been reversed, and the trustee on the bankrupt estate of the person who was apparently absolute disponee, but was only a holder in trust for a special purpose, had claimed the estate for the creditors, it may be questioned if it would have been found bankrupt estate. That was not a trust in the sense of the case of Jeffrey. There was no intention to intrust the disponee with the disposal of the property in any shape, and the disponent *bonâ fide* acted as if there were no such deed in existence. Creditors could not have been deceived by it into the notion that the property was the disponee's. It is worthy of remark, that in this case there appears to have been an opportunity for raising such a question, which seems to have been abandoned. Mr Farquhar Gordon, a trust-disponee of the Marquis of Huntly, re-disposed some of the estates which he held in trust, but omitted to redispone a part of them. He was sequestrated, but his trustee did not attempt to claim the property omitted, for the creditors. After the strict interpretation, however, of the effect of a sasine on which

creditors have a claim, in the case of *Mansfield*, it would not be safe to hold that the creditors have no right in such a case.

(407.) *Trust created by the Bankrupt.*—Although the records present a disponent of the bankrupt as infeft absolutely on his heritable estate,—if the bankrupt has continued in possession, and the right of the disponent was merely a temporary trust for the purpose of accomplishing an arrangement as to titles not inferring possession of the property on the part of the trustee, or any power to bestow it otherwise than by reconveyance to the truster; and neither the person so holding in trust, nor any one professing to hold a beneficiary right through him, is a claimant,—the apparent right on the record does not so divest the bankrupt as to affect his onerous transactions regarding the estate subsequent to it, and there is no right to compete with or reduce them, which the trustee on the sequestrated estate can take through the bankrupt's right to reconveyance, or otherwise.

Such appears to be the principle decided in the elaborate case of *Lindsay v. Giles*, 27th Feb. 1844, 6 S. 771, arising out of the sequestration of the Marquis of Huntly. The Marquis had purchased lands, by the title of which he held a base fee under one who also held base. He made up titles, as vassal of the holder of the crown, so as to extinguish the immediate sub-fee. The catholic superiority was in himself; so that on the extinction of that intermediate fee, he held the superiority and the *dominium utile* by separate titles. Wishing to divide and convey away superiorities for the purpose of creating votes, it was presumed that it was necessary to separate the superiority from the *dominium utile*. It seemed to be supposed that this could be accomplished by interposing a mid-superiority between his own title as prime superior, and his title to the *dominium utile* as holding of himself. It was found, however, that this had not been accomplished, and that the conveyance to the trustee must be dealt with as an absolute disposition. The disponent, a clerk of the disponent's law-agent, had been infeft: he had granted no back-bond or other acknowledgment of the nature of his right. The disponent performed no act of ownership, but possession, in every respect, remained unquestioned in the disponent. The disponent, *bonâ fide* exercising his right as absolute proprietor, afterwards borrowed money and granted real securities on the property; and these were the rights questioned by the trustee on the sequestration. The trustee on the sequestrated estate, for the purpose of standing vested in the reversionary right of the bankrupt, brought a declarator of trust and adjudication against the heir of the disponent. The trustee obtained a conveyance from this heir-at-law, redispensing the

lands, and declaring them to have been held in trust. It thus happened, that the title on which the trustee came into court, declared the trust character of the transaction. The decision explains its own grounds. It found, "that the Marquis of Huntly, having purchased the barony and lands of Finhaven, completed titles to the same by two several infeftments, one holding immediately under the crown, the other holding under himself, and entered into possession of the same as proprietor thereof: Find that the feu-disposition of date 10th October 1823, and infeftment thereon, of a part of the said barony, to the late David Brown, applied to the *dominium utile* of the lands conveyed, but that the same is proved and admitted to have been a trust title, granted for a temporary purpose, and for the granter's own behoof, which passed no right of property in the lands to the said David Brown, who never had any possession: Find that the said Marquis remained the true owner of the lands, and continued as such in the public and uninterrupted possession of the same, and of the rents, maills, and duties thereof, and in the exercise of all the powers and rights of the heritable proprietor thereof, in virtue of his original infeftment in the lands: Find that the said Marquis was not divested of the real right and property of his estate by the said trust right and infeftment thereon, and that the heritable securities granted by him in virtue of his original and real right, do constitute valid and effectual rights affecting the said lands, and create real preferences in the persons of the creditors; and find that no objection thereto can be effectually stated by the trustee on the sequestrated estate of the Marquis, in respect of the said trust title in the person of the said David Brown."

There were many other specialties in this and the other cases conjoined with it. There were questions as to the validity of sasines and other proceedings; and in the case of another set of trust conveyances, it occurred that there were fatal objections to the proceedings by which the trustee professed to denude himself; but the court laid their decision on the question of the trust, and were unanimous in their view. The leading principle was, that such a trust is a burden on the property, not an alienation of it, and, unless in competition with a claimant holding right from the trustee, the truster is the absolute proprietor. A distinction was drawn between the title of a person who has a reversionary right under a trust granted by another person, and a proprietor who is himself the truster. There were cases in which it had been found, that parties for whom trustees held, had no real right in the property which might be feudally conveyed, but only a *jus crediti* which might be assigned.—*Gordon's Trustees v. Harper*, 4th Dec. 1821, 1 S. 184; *Macdowall v. Russell*, 6th Feb. 1824, 2 S. 682. But it was found that the point of difference arose in the circumstance, that in those cases the beneficiaries were not themselves the granters of the trusts. The principle of the decision was found in the cases of *Campbell*, in *Ranking of Edderline's Creditors*, 4th Jan. 1801, M. *Adjudication*, No. 11;

and *M'Millan v. Campbell*, 4th March 1831, 9 S. 551, affirmed 14th Aug. 1834, 7 W. & S. 441. In the opinion delivered by the Lord Justice-Clerk, there were these observations:—"There is the great and important fact, that the Marquis, as the *true owner*, remained in uninterrupted *public* and *patent possession* of the estate, *exercising all the rights and powers of a proprietor, as in virtue of his original infeftment*, undisturbed and unrestricted. This possession is not only to be taken in connexion with the evidence and admission of the trust, but is even more important when viewed in reference to the character in which he had the possession, viz. as the true owner, and to the title to which it was referable, viz. his original and radical right by his infeftment in the lands. From his original and radical right that possession cannot be separated. It was never interrupted. The *character of true owner* was never lost or surrendered. The titles in names of Gordon and Brown (proved and admitted to be nominal and in trust only) operated no change, and had no effect whatever on the continued exercise and assertion of the granter's radical and original right."

"In some respects this case is more favourable for the application of the principle which governed *Edderline*; for, 1. The *possession* here remained with the party in whom was the radical right, whereas, in the other class of cases, the trustees were, in many instances, in full and complete possession, and in possession, too, for creditors. 2. The trustees in *Edderline* had onerous purposes to fulfil against the granter, and were not entitled to reconvey till all these purposes were fulfilled. Here, not only are the titles mere trusts, but nominal in every sense of the term, for there is no trust to be fulfilled, but to reconvey. And 3. The competition in *Edderline* was between onerous creditors, one set of whom founded on the title in the person of the trustees, and the undoubted and irrevocable conveyance to them, followed with possession; whereas, here, the very remarkable peculiarity is, that no competing right or interest whatever is founded or granted in virtue of the titles in favour of Gordon and Brown; Mr Lindsay, on the contrary, concurring in maintaining that the Marquis, as the true owner, remained in possession all along under his original radical right.

"I think we are bound to hold, on the authority of the cases in which the trust was proved, because expressed in the trust title, that when the trust *is*, in a manner as satisfactory, *proved* and *acknowledged*, and when the party in whom was the real right and property remained in possession under his radical feudal title, the difficulty created by the nominal title must give way to the paramount principle of the true right of property under the title of the person who granted the nominal and trust title, and that the true owner, in the words of the judgment in *M'Millan*, was not divested, so that his acts could not affect the estate, in the possession of which he remained as the true owner."

"I am most fully satisfied, that when the title is *proved* to be

nominal, passing no right of property, and when no interest whatever has been acquired by any third party, which can be pleaded against the granter, or those acquiring rights from him, and when the granter continued as the true owner in full possession, he is not to be taken in law as completely divested of his real right and property in the estate, and that his onerous deeds must be supported, in respect of his original and radical feudal title, to which title alone any right of property really was attached."

Lord Moncrieff observed:—

"The case of trust is admitted, and is palpable on the face of the whole proceedings; and it is the case on which the plea of Mr Lindsay himself depends. There is no occasion to prove it, either by the oath of Mr Brown or by his writ; and if any thing of that kind were necessary, it is proved by the writ of his heir here produced. Then, wherein is this case different from any of the cases decided? It is truly a stronger case than any of them. This is not the case of a trust for creditors, with power to sell; in which case the lands might depart for ever, or, at any rate, might be held indefinitely as a separate and independent feudal estate. It is not the case of a trust for debts in the first instance, and an ulterior destination, rendering it certain, if the form only was regarded, that it would never return to the granter. These are strong cases, where infestment has followed, for holding that still the radical right remained in the granter. Yet all have been so decided, and this even in a competition of creditors. The present case seems to be a far simpler and clearer exemplification of the principle in correct logic and plain justice. The disposition to Mr Brown never was intended for any purpose but that of a formal title, for the purposes of the granter. It never produced any thing to create any interest in a third party. It is the bare disposition in trust, which it was at first. Then, how can it be, that a party as trustee on that trustee's estate, founding on that very fact of mere trust as his title, can claim the property, to the exclusion of a party who transacted onerously with the truster, in the full possession of his property, relying on that very title which remained in his person, and in virtue of which, though under the incorrect denomination of a mere *jus crediti*, the trustee for his creditors now claims it as his?

"I confess that I cannot see the distinction. I know that there is a great difference between the case of an absolute disposition and a disposition under reversion or qualification in any question with a party transacting onerously, and in *bonâ fide* with the disponent. But where there is no such transaction with the disponent, I am unable to see what difference it makes on the question between parties who alike depend on the title of their common debtor, the acknowledged proprietor of the subject, whether the right in him is expressly reserved in the title which it undoubtedly covers, or is necessarily admitted as soon as the subject becomes litigious. I cannot see either truth in the legal deduction, or justice in the application of legal prin-

principles, in the distinction so struggled for, which, in the way it is laid down by any authority, has reference to an entirely different state of circumstances."

Had there been in this case any party appearing who held an onerous right from the trust disponee, the question would have assumed a different aspect, and the decision does not afford law to meet such a case. It may even be doubted whether, when the cases of *Mansfield and Paul*, as above, (p. 336-7,) are kept in view, a trustee on the trust-dispensee's sequestrated estate might not have had a preferable title to compete both with onerous disponees, and with the creditors of the truster.

(408.) The vesting in the trustee is not to affect the superior's rights, nor to affect any question of succession between the heir and executor of a creditor, nor to affect the rights of the ancestor's creditors, otherwise than by completing diligence through the act and warrant, in their favour, and giving them the benefit of the three years' preference over those of the heir.

Act, § 79. As to the three years' preference of the ancestor's creditors, see above, p. 111. The exceptional clause in the statute on this subject is "except that the act and warrant of confirmation shall operate in their favour as complete diligence." From a strict interpretation of these words it might be questioned if the diligence is held as completed at the date of the sequestration.

(409.) *Leases*.—A right to a lease in the person of the bankrupt is carried by the sequestration. It is carried, however, with all its conditions; and if these exclude assignees, the landlord may refuse to receive the trustee or the assignee of the trustee as tenant.

Leases, although personal rights, being carried by adjudication, are considered properly to belong to this branch of the subject. Under the old act it was customary, if the lease was to be adopted or disposed of by the trustee, to obtain an assignation of it. Although it would appear that an assignation may be exacted under the 87th section, it is probable that the general vesting clause will be had recourse to. This is an adjudication, and its effect on leases will be ruled accordingly. The landlord's right of exclusion is reserved, not only where assignees are excluded, (*Cunninghams v. Hamilton*, 21st Nov. 1770, M. 10410,) but where he reserves the right of approval, *Elliot v. Buccleuch*, 4th Dec. 1747, M. 10329. The exclusion of assignees is pleadable only by the landlord, and if not objected to on his part it is *jus tertii* in any other person to oppose the vesting in the trustee. *Hay & Wood, Petitioners*, 8th Dec. 1801, M. 15297. See *Hunter on L. & T.* p. 200, *et seq.* Professor Bell says,

“ Although there is an implied exclusion of voluntary assignees in agricultural leases, an express exclusion is requisite to prevent creditors from attaching the lease by legal diligence.” 1 B. C. 77.

As to the assignations which will defeat the rights of the creditors at large, see above on the act 1696, p. 234. Baron Hume reports the case of *Grieve v. Grieve's Creditors*, 27th May 1790, H. 778, where an ineffectual attempt was made to compete with the creditors of a sequestrated estate, on an heritable bond by the lessee on which infetment had been taken.

(410.) Where bankruptcy is stipulated as an irritancy, and founded on by the landlord, no benefit can be taken from the lease by the creditors. If there is no such positive irritancy, however, sequestration will not prevent the tenant from continuing to perform the prestations for the benefit of his creditors, though the lease should exclude assignees.

In *Gordon*, petitioner, 7th Dec. 1805, M. *Tack*, App. No. 11, bankruptcy being an irritancy, was found to warrant a removal, though a composition had been accepted, and the bankrupt had been discharged before decree. See also *Forbes v. Duncan*, 2d June 1812, F. C. The irritancy of bankruptcy, like the others, is pleadable only by the landlord. In *Bruce v. Kinloch*, 28th June 1832, 9 S. 831, a clause in the lease, “ That in case of the bankruptcy of the tenant, his creditors shall have no power over it to appoint a manager, or in any manner of way to interfere with the subjects let, or for the tenant himself to continue his possession, directly or indirectly, for behoof of his creditors,” was found on the tenant's sequestration not to void the lease, although there can be no doubt that the landlord could have pleaded an irritancy.

(411.) Where the lease excludes assignees, but does not exclude subtenants, the bankrupt may give any beneficiary right capable of being held by a subtenant, to the trustee.

Crawford v. Maxwell and his Creditors, 28th June 1758, M. 15307. It may be presumed that where the trustee can show that there is any beneficiary right which the bankrupt can convey without an irritancy, he is entitled to insist on its being conveyed under the 87th section, referred to in par. 412, though that section seems to have had in view purely heritable rights. Creditors cannot insist upon an assignation, if there be an irritancy. “ The principle recognised under the sequestration statute is, that the bankrupt tenant is not bound to grant deeds which would be hurtful to him.” *Hunter on L. & T.* 811. On the effects of the trustee undertaking the liabilities of a lease, see the subject of his liabilities.

(412.) *Bankrupt's aid in completing the Investment.*— The bankrupt, if required, must grant all deeds necessary

or feudally vesting the estate in the trustee in terms of the act. If the bankrupt's title is incomplete, the trustee may complete a title either in his own person or in that of the bankrupt, and superiors are bound, on being required, to enter him.

Act, § 87. This clause will be serviceable in the case where the bankrupt not having his own title made up, has granted a warrant to complete a real right to another person, on which infeftment has been taken. Whatever difficulty there may be regarding the power of the holder of a personal right to complete it by infeftment after the first deliverance, there seems to be no doubt, that, in the case of a person holding a warrant from the bankrupt being infeft, the bankrupt's infeftment will accresce to the person infeft. In such a case, instead of either completing the bankrupt's title, or taking a conveyance of the bankrupt's personal right, and completing the title in his own person, the trustee may complete a title in his own person, which will not accresce to any other holder.

In *Paul v. Turnbull*, 22d May 1835, 13 S. 818, under the old act, the bankrupt's ancestor had executed a trust conveyance, for certain purposes, the reversionary right being destined to certain heirs of entail, on which the trustees were infeft. The bankrupt's trustee gave the bankrupt a charge to enter heir in special to his ancestor, and thereon adjudged; but it was found that there was nothing in *hereditate jacente* of the ancestor to take. An attempt to make up titles by a disponent on an heritable bond being equally ineffectual, the claims of parties resolved themselves into competing personal rights, and the holder of the heritable bond was preferred, as it was sufficient to carry the right of reversion under the original trust-deed. See also *Gordon v. Kemp*, 3d Dec. 1836, 15 S. 187, and *Renton v. Girvan*, 20th Dec. 1833, 12 S. 266, where the trustee of a bankrupt who had not made up titles, was refused an adjudication in implement of a disposition, by which the bankrupt obliged himself to serve himself heir, the bankrupt's proper title being that of a reversioner in a trust-deed, granted by his predecessors.

In *Miller v. Wright*, 4th July 1835, 13 S. 1038, under the old act, an interdict was applied for to prevent the trustee from making up titles by adjudication on special charge to enter heir, and thereby constituting a title which would relieve the bankrupt of certain burdens in favour of the disponent's wife and daughters, contained in a disposition to him by his ancestor, on which he had enjoyed both heritable and moveable property. It was pleaded, that, if the bankrupt himself had so attempted to make up titles, it would have been a fraud. The bill was passed of consent, to try the question. It was afterwards held to be the duty of the trustee to make his title, passing by the settlement, and leaving the widow and children personal creditors; 5th July, 1836, 14 S. 1087. See also *Paul v. Boyd*, 19th May, 1829, 7 S. 621.

(413.) *Trustee not making up Title.*—The trustee takes, by virtue of the act, all personal rights of the bankrupt to heritable property. If he consider it the more expedient method, he may, without making up a title, either in his own person or in that of the bankrupt, convey the heritable estate to a purchaser, along with “such procuratories, precepts, or other warrants, as the bankrupt might competently have granted.” Such powers are as effectual as if they had been granted by the bankrupt, with concurrence of the trustee. They are not affected by inhibition against the granter, reserving the effect of an inhibition in the ranking. Superiors are bound to enter such a purchaser.

Act, § 87. This will in general be the more economical method of disposing of the estate. The title so conveyed will, in the general case, be simple and beyond dispute. Where, however, the bankrupt has already granted procuratory or precept, such a warrant cannot be granted by the trustee, who, under this clause, takes such rights only as the bankrupt might competently have granted.

(414.) *Heritable Property not in Scotland.*—All property in other parts of the British dominions partaking of the character of heritable property in Scotland, and described as “lands, tenements, and hereditaments,” belonging to the bankrupt, and which he could dispose of, or which could be taken by his creditors, and all titles and writs regarding such property, vest in the trustee, as at the date of the sequestration. If by the law of the place, the title of a person to whom such property is transferred requires to be recorded, the act and warrant must be recorded; and a *bond fide* purchase occurring before it is recorded, “for valuable consideration, and without notice of the sequestration,” is not affected.

Act, § 80. See above, p. 314, the effect given in Scotland to the corresponding provision in the English Insolvent Debtors’ Act.

(415.) *Deceased Debtor’s Representative.*—In the case of the sequestration of the estate of a deceased debtor, whose successor has made up a title to his heritable estate, the trustee may, by petition, apply to the Lord Ordinary, to vest the estate in him. The Lord Ordinary orders the petition to be served on the successor, requiring him to

answer within fourteen days. An abbreviate of the petition and deliverance, according to schedule B. No. 3 of the act, in the register of inhibitions, is equivalent to an inhibition.

Act, § 88. The intended application of this clause was to the case of a debtor immediately deceased, whose successor had made up a title. In the practice arising out of the decision which brought the estate of *any* deceased debtor within the act, it was necessary to apply the clause to cases where the original debtor had been dead for some time, and his successors had alienated the estate. In *Barstow v. Graham*, 15th Dec. 1843, 6 D. 293, the immediate successor of the debtor had made up titles *cum beneficio inventarii*, and granted conveyances in security on which the disponees were infest. He had died, and was succeeded by an heir, who had also made up titles *cum beneficio*, when sequestration was awarded. Before disposing of the case, intimation was ordered to be made to the holders of securities on the estate.

(416.) If no cause be shown to the contrary, the Lord Ordinary is to declare the estate transferred to, and vested in, the trustee, as at the date of the sequestration; reserving all preferable rights and securities which are not null and reducible, and with a special reservation applicable to the circumstances, if the heir who has made up titles has granted alienations. An abbreviate of the petition and deliverance must be recorded, within eight days, in the register of abbreviates of adjudication.

Act, § 89. In the case of *Barstow*, above referred to, the reservation was of objections by parties who had acquired heritable rights, to the title of the trustee to challenge them on grounds not competent to the last heir who had made up titles, or parties claiming through him, and also reserving the answer of the trustee to such objections. The interlocutor, in usual form, reserved such securities, existing at the date of the sequestration, as were not null or reducible; an expression which would reserve the right to reduce an alienation by an heir, within the year after the ancestor's death. See above, p. 110.

SECT. 5.

VESTING OF SUBSEQUENT ACQUISITIONS AND PERIODICAL PAYMENTS.

(417.) *Subsequent Acquisitions.*—There is a provision for vesting in the trustee any property which may fall to the bankrupt during the sequestration. It embraces “any

estate wherever situated," and whether it "be acquired by him, or descend or come to him." As in the case of the vesting of the original estate, such an acquisition vests, without any conveyance, "as at the date of the acquisition thereof or succession."

Act, § 81.

(418.) When a trustee comes to the knowledge of such an acquisition, it is his duty to present a petition, setting forth the circumstance, to the Lord Ordinary, who appoints intimation in the Edinburgh Gazette, and cites all concerned to appear within a limited time for their interest. On the expiration of the time, he deals with the application; and, if no cause be shown to the contrary, declares all right and interest to the estate as it comes to the bankrupt to be vested in the trustee, in the same manner as the rest of the bankrupt estate, from the date of the acquisition or succession, "and the proceeds thereof, when sold, shall be divided, in terms of this act." There is a provision, that "the rights of the creditors of the person from whom such estate shall come or descend to the bankrupt shall be preserved entire."

Act, § 81. This is in implement of the interlocutor awarding sequestration, which carries all estates which "belong, or shall thereafter belong, to the debtor or company," § 13. There is no such provision in the old act as the above, which is adapted from the assignment clauses in the English Bankrupt Act (6 G. IV. c. 16, §§ 63, 64.) By the old act, it was simply required that, in the case of such an acquisition, the bankrupt must "make a full discovery thereof to the trustee," "in order that the trustee may have an opportunity of taking such steps as are necessary or proper for the interest of his constituents. (54 Geo. III. c. 137, § 39.) The method by which the trustee proceeded in such a case, was an application to the court for a supplementary sequestration. (2 B. C. 409.) In this manner he came into court, not backed by the imperative directions of an act of parliament, but on the equitable claim of the creditors, and he was of course liable to be met by other equities. In *Christie v. Loudon*, 19th Dec. 1835, 14 S. 191, the Lord Ordinary (Jeffrey) remarked, that "The provisions of the 39th section of the bankrupt act prove, no doubt, that the sequestration creditors are understood to have an interest in subsequent acquisitions of the bankrupt. But it is equally clear that it is not an exclusive interest. As to moveable property, posterior creditors must certainly be allowed to rank along with them; and may often be

entitled to a preference. And even as to heritage, though the sequestration is declared to have the force of an inhibition, the Lord Ordinary thinks it exceedingly doubtful whether this was intended to affect any thing but the existing estate." There were many other difficulties suggested by his lordship, which the above provision obviates in the new act. In this case of Christie, a supplementary sequestration was not attempted, because the bankrupt had died before the acquisition was discovered. The action was against the heir, to ordain him to execute a conveyance to the trustee. The case illustrates the equities which could be pleaded against this imperfect method of recovering the bankrupt's acquisitions. It was maintained, that the property was procured for the bankrupt by a friend to enable him to carry on trade; and that the trustee and the commissioners knew him to be so employed, and dealt with him. This defence was considered so material, that the court ordered an issue to discover whether the trustee and commissioners were acquainted with the fact of the bankrupt's carrying on business.

By the existing act the vesting is imperative, and there is no room for such equities being pleaded. In the case of Christie the acquisition was a house which a friend bought at a sale of the bankrupt's property under the act. It will have to be kept in view, that now (if the matter was doubtful before) there are no means by which friends can purchase any part of the sequestrated estate, and restore it to the bankrupt before his discharge, without the creditors having a right to it.

It would seem that, as the sequestrated estate is to be divided "among those who were creditors at the date of the sequestration," (§ 100,) and the proceeds of new acquisitions are to be "divided in terms of this act," creditors subsequent to the sequestration have no claim on such acquisitions, see Bell on the recent statutes, 169. This is so far different from the understood law under the old act, that, in the above case, one of the issues was directed to the discovery of the debts incurred by the bankrupt subsequently to the sequestration. It has to be kept in view, moreover, that the clause vesting such estate *ipso jure* from the moment of acquisition or succession, brings with it those other important clauses of the act which apply to the estate at the time of the sequestration, and tie up the bankrupt's hands in relation to it. It follows that, in relation to transferences of, and bargains concerning any such acquisition during the sequestration, the same prohibitions and the same exceptions apply, which have been described in connexion with the estate, possessed at the commencement of the sequestration.

(419.) *Salaries*—The salary of any office which the bankrupt may hold is attachable, in so far as it exceeds a competence suited to his position, when taken in connexion with his other sources of income, and in so far as it is not

specially excluded from the claims of creditors on grounds of public policy. The pay of officers in the army and navy, and the salaries of officers connected with the administration of justice, are, on this ground, protected; but the incidental fees of such officers, if not necessary for their subsistence, may be attached.

47 Geo. III. c. 25, § 4. A. B. petitioner, 30th June 1824, 3 S. 195, where a clergyman, whose income was £195, was allowed to retain £95, and the means of meeting certain annual expenses incident to his office. In the case of *Moinet v. Hamilton*, 2d Feb. 1833, 11 S. 348, where the question referred to the fees of a pursuivant-at-arms, the interlocutor was, "Find that the fees of the bankrupt's office are legally attachable by his creditors, and that this mode of supplementary sequestration is a competent mode of attaching said fees for behoof of the creditors in general; but, in respect that the said fees and the salary of the office taken together do not exceed an adequate fund of subsistence for the bankrupt while vested with the office, refuse the desire of the petition." It is held in England, and would doubtless be held in Scotland, that the produce of the bankrupt's daily labour is his own. *Smith's Mercantile Law*, 647. It deserves to be remembered, however, that in the higher professions, and in employments requiring skill and intellect, large sums may thus be received; and it is held in England that the gains of a person who acts as an employer and requires a stock in trade, are not exempt—as where one acted as a furniture broker, employing men and vans, (*Crofton v. Poole*, 1 B. & Ad. 568.) It may be doubtful, indeed, how far a considerable acquisition, made either by industry or by an effort of trading, may not come under § 81, as above commented on, as an estate "acquired" by the bankrupt, and so vest from the moment of its acquisition. Retiring allowances are attachable *Tod v. Tod's creditors*, 12th Dec. 1839, 2 D. 224; but such cases generally come under the subject of *cessio*, to which reference may be made for farther illustration of this subject.

There is no clause in the act vesting salaries in the trustee, and therefore they can only belong to the bankrupt estate when specially adjudged to it. The plan for obtaining such adjudication would seem to be the same which was adopted under the old act in the case of new acquisitions—a supplementary sequestration, (see 2 B. C. 409-411.) As they require a special adjudication, all payments of such salaries, and, it would seem, all employments of the money by the bankrupt, will be valid until the adjudication is obtained. Unless they should fall under the description of property acquired as above, all industrial acquisitions and profits will come under the same rule.

CHAPTER IV.

INTERIM MANAGEMENT.

SECT. 1. BETWEEN THE APPLICATION AND THE ELECTION OF INTERIM FACTOR.

(420.) *Registration of abbreviate.*—There are certain duties incumbent on the petitioning creditor, or “the person applying for sequestration,” who will be responsible for the consequences of omitting them. Before the expiry of the second lawful day after the first deliverance, he must present an abbreviate of the petition and deliverance to the keeper of the register of hornings and inhibitions at Edinburgh. The abbreviate must be in the form provided by schedule B, (No. 1,) attached to the act, and must be signed by the party or his agent.

Act, § 20. The omission to record the abbreviate would have the serious effect of depriving the creditors of what is equivalent to an inhibition and a citation in an adjudication, for their common behoof, leaving no means of rectifying the omission, as the act expressly says, “If the said abbreviate be not so recorded it shall have no effect as an inhibition or citation as aforesaid.” Under the denomination, “party applying,” it might be a question, whether a concurring creditor incurs any responsibility, were it not that, practically, the responsibility will ultimately fall on the law agent. The responsibility of the bankrupt, when he himself petitions, to his creditors, is, of course, a mere name.

(421.) *Gazette notice.*—Within four days after the date of the deliverance awarding sequestration, the party applying as above must publish, in the Edinburgh Gazette, a notice of the sequestration, and of the times and place for electing the interim factor and the trustee: and within eight days after the same deliverance, he must insert the same notice in the London Gazette.

Act, § 20. It is specially provided, that it is unnecessary to insert any other notice, under the act, in the London Gazette. The effect of the omission to insert the notice in the gazette has been considered above, in reference to the case of Gray, (p. 302.) That case shows, that a notice with a material error in the bankrupt's name, is equivalent to no notice. The person whose estate was sequestrated was “James Fife, manure-merchant in

Portobello," and he was called "*Alexander Fife*." This was the case of a petition by the debtor with concurrence. To rectify the error and validate the subsequent proceedings, after it was found, as above, that the sequestration could not be recalled, a petition was presented with the statutory concurrence, praying the court to appoint a meeting for election of an interim factor, &c. and appoint intimation in the gazettes. The court were satisfied that this afforded the proper method of rectifying the error, and ordered accordingly. *Fife*, Petitioner, 17th Feb. 1844, 6 D. 686.

In counting the days within which any act devolving on the petitioning creditor must be done, the same mode of calculation would, doubtless, be adopted which holds in calculating the sixty days, in relation to the act 1696, and like cases. Thus, there will be four free days within which the notice may be inserted in the *Edinburgh Gazette*: in other words, on the expiry of the day on which sequestration is awarded, the petitioning creditor will have performed his duty, if he present the notice during business hours, before the end of the fourth day.

(422.) On the remit of the process to the sheriff, it becomes the petitioning creditor's duty to transmit to the sheriff clerk of the county where the meeting for election of interim factor is to be held, 1st, A copy of the petition for sequestration, along with a copy of the first deliverance, and a copy of the deliverance awarding sequestration, where that is different from the first deliverance. These are certified by the bill-chamber clerk. 2d, The productions made with the petition.

Act, § 27.

(423.) *Application to the Sheriff*.—After the awarding of sequestration, but before the election of an interim factor, there is no individual who has a direct administrative authority over the estate, and whatever is done in relation to it by the creditors must be under judicial authority. The sheriff is the proper magistrate to be applied to in such a case. He has special authority under the act "to seal up and cause to be put under safe custody the books and papers of the bankrupt, and to lock up his shop, warehouse, or other repositories, and to keep the keys thereof."

Act, § 50. The petitioning creditor, having the judicial proceedings in his hands, is the party who must be looked to for the accomplishment of whatever does not require judicial authority, between the petition and the election of an interim factor; but the act invests him with no control or authority over the estate,

and when any such act has to be done in relation to it, he must seek judicial authority. The sheriff is, as above, the officer to whom he must apply. The act declares that the sheriff is to have "as full power and jurisdiction as hitherto possessed by the Court of Session, (subject to review,) in all questions in the sequestration, except," &c. (§ 27.) Under this clause, the sheriff may, on application by a party interested, authorize proceedings for the custody and protection of the estate. Professor Bell, commenting on the old act, says:—"There may occur questions in which recourse for this purpose to the supreme court is proper in the first instance, both on account of the magnitude of the question, and of the expedition with which it may be necessary to decide. Where bankruptcy happens to a great manufacturer, with the hands of his workmen full of work, things may be utterly spoiled by stopping their operations. Where a number of men are assembled, as in an iron work, the dismissal of them may reduce the property to nothing, while their being continued may be attended with no loss. The letting down of the fires may require many hundred pounds to restore the manufactory to the state in which it was. The question of preservation, in such cases, comes to be complicated with something of speculative advantage or loss, which makes the resolution to be formed a matter of great difficulty; and although the Court of Session will exercise with extreme reluctance such discretionary powers, it is obviously necessary that there should be somewhere authority to control the proceedings of individual creditors, in consideration of the interest of others who have had no opportunity of appearing." 2 B. C. 356. Under the existing act, however, it is clear that such an application can only be made to the sheriff,—see *M'Naught & Co. v. M'Queen*, 19th Jan. 1841, 3 D. 378. His judgment in such a case is reviewable, not by advocacy to the Lord Ordinary, but by note of appeal to the Inner House during session, or to the Lord Ordinary on the bills during vacation, (§ 128.)

It has been decided, that the protection of the estate from dilapidation through inept diligence, will justify interference. *Samson v. M'Cubbin*, 15th March 1822, 1 S. 406.

(424.) *Judicial Factor*.—In the case of an application for the sequestration of the estates of a deceased debtor, the petitioning creditor may, at any time between the execution of the citation and the awarding of the sequestration, "apply by written note to the Lord Ordinary, to appoint a judicial factor to administer the estate in the meantime, and if no cause be shown to the contrary, the Lord Ordinary may appoint a factor accordingly."

Act, § 14. The policy of this provision is owing to the period that may, if the successor do not consent, elapse between the application and awarding.

